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IN THE
Supreme Court of the United States

October Term, 1979

No. 79-67

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.**

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No. _____

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.**

Petitioner William Walter respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below.

The 2-1 opinion of the Court of Appeals was filed on April 2, 1979, and appears as Appendix A. The decision is reported at 592 F.2d 788. A published but still unreported per curiam opinion which denied a petition for rehearing and petition for rehearing en banc yet discussed an issue previously asserted and not before commented upon by the court was entered on June 15, 1979 and appears as Appendix B.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 2, 1979, over the dissent of Circuit Judge Wisdom. Petitioner duly filed a petition for rehearing with suggestion for determination en banc, which petition was denied on June 15, 1979, after the court had been polled at the request of one of its members for an en banc hearing. A copy of the order denying said petition appears as Appendix B. Thereafter, petitioner filed a motion for stay of issuance of mandate pending petition for writ of certiorari to the United States Supreme Court, which motion was granted on June 22, 1979, provided a petition for writ of certiorari is filed in the clerk's office of this Court on or before July 15, 1979. A copy of the order staying issuance of the mandate is attached as Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The petitioner was charged with conspiracy and aiding and abetting violations of the federal obscenity laws. Twelve sealed cartons containing 871 8-mm films of male homosexual orientation were taken by a third party from a common carrier and then, at the FBI's direction, held for five days before the FBI took delivery of them. FBI agents viewed the films two months later and two months after that turned the films over to the United States Attorney's Office. Over a year later an indictment was returned charging that five of the 25 titles of film were obscene. No search warrant was ever obtained, nor was there ever an adversary hearing. Trial evidence revealed petitioner was a business partner of a defendant shown to have authorized the shipment of film. Petitioner, however,

was not shown to have ever seen the films in question or to have exercised any role in the business within two months either before or after the shipment. With the foregoing explanation, the questions presented are:

(1) Whether the FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in *Burdeau v. McDowell*, 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure"—that by the third party and that of the government—where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits.

(2) Whether the FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth Amendment as had been held in a similar case by the Eighth Circuit as well as a "search" within the teaching of *United States v. Chadwick*, 433 U.S. 1.

(3) Whether the Government by appropriating presumptively protected First Amendment material received from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty for which is suppression of the material's use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(4) Whether in an obscenity prosecution *derivative* proof of scienter solely through evidence of petitioner's

participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(5) Whether in an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the mores of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States*, 436 U.S. 293, that the community includes all adults who comprise it since person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(6) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(7) Whether a juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be "taken

as a whole" under the directive of *Miller v. California*, 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

(8) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States*, 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(9) Whether due process of law under the Fifth Amendment required that petitioner's case be severed from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders.

(10) Whether the refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Fifth and Sixth Amendments to the Constitution, Title 18, United States Code §§ 2, 371, 1462 and 1465 and Rule 14, Federal Rules of Criminal Procedure, appear as Appendix D hereto.

Statement.

Petitioner appeals from a judgment of conviction rendered after a trial by jury before the Honorable Wm. Terrell Hodges, a judge of the United States District Court for the Middle District of Florida, Tampa Division, under an indictment charging both conspiracy to violate and aiding and abetting violations of Title 18, United States Code, Sections 1462 and 1465.

The indictment was returned in the United States District Court for the Middle District of Florida, Tampa Division, on April 6, 1977, and contained eleven counts charging petitioner and five others (two of whom were corporations) with violations of federal obscenity laws. Count One charged a conspiracy both to use a common carrier to transport obscene matter in interstate com-

merce and to transport obscene matter in interstate commerce for the purpose of sale or distribution. Counts Two, Four, Six, Eight and Ten charged the petitioner and others with aiding and abetting one another in using a common carrier to transport obscene matter in interstate commerce. Counts Three, Five, Seven, Nine and Eleven charged the petitioner and others with aiding and abetting one another in transporting obscene matter in interstate commerce for the purpose of sale or distribution.

A. Prior to trial, petitioner filed a motion to suppress and return the subject films. In connection with the hearing of that motion the following facts were adduced:

On Thursday, September 25, 1975, twelve (12) sealed boxes containing 871 8mm films of homosexual orientation were shipped via Greyhound Package Express from St. Petersburg, Florida, to Atlanta, Georgia (R.T. Vol. 1 Supp. at 6.)¹ The shipment, directed to "Leggs, Inc." on a "Will Call" basis, was reforwarded to a Greyhound substation contrary to Greyhound's usual practice of holding "Will Call" items for pick up—whereupon L'Eggs Products, Inc. ("LPI") was contacted to pick up the package. (R.T. Vol. 1 Supp. at 20-21, 33-35.)

Michael Horton, Area Manager for LPI, drove to Greyhound to pick up the packages on Friday, September 26, 1975. Horton, accustomed to receiving only one or two boxes weighing but a few pounds, was surprised to see twelve unusually wrapped and reinforced boxes weighing hundreds of pounds. Since the

¹"R.T." refers to the Reporter's Transcript of the Record on Appeal.

boxes did not look "normal" to him, Horton pried one open and removed a box of film labeled "David's Boys." The box purported to describe its film contents. (The "David's Boys" series of films found in the shipped cartons consisted of 25 different titles of film of which 5 were charged in the indictment.) Horton then replaced the box of film, advised an employee at the Greyhound terminus that the shipment did not belong to LPI and left. (R.T. Vol. 1 Supp. at 56, 59, 61, 76-77, 81-82, 99.)

When Horton returned to LPI he advised his Branch Manager William Fox about the shipment. Fox immediately went to the Greyhound terminus, examined a box of film from the already opened package and concluded that the 12 cartons were not the property of LPI. Fox did not pay the collect charges on the packages since LPI had no interest in them, but he took the shipment back to LPI nonetheless. (R.T. Vol. 1 Supp. at 119, 121, 129, 131; Vol. 7 at C-146-47, C-150, C-178.)

At LPI, Horton, Fox, Gregory Shults (LPI's Southern Regional Distribution Manager) and others opened all twelve cartons and examined the boxes containing the David's Boys films. Shults removed an 8mm film from its case and held it up to the light, but the frames of the film were too small to be observed in this fashion. Thereafter, Horton telephoned the FBI and informed Special Agent Lawrence Mandyck of what had happened. Mandyck instructed him to put the boxes in a safe place "where nobody can bother them" and that the FBI would pick them up. (R.T. Vol. 1 Supp. at 63, 65, 90, 107, 133, 143-44, 171.)

Five days later on Wednesday, October 1, 1975, Agent Mandyck passed by LPI to pick up the 871

boxes containing film. Mandyck conceded that the box cover description of the films may have been incorrect and that he caused no application to be made for a search warrant during the five day hiatus although he easily could have obtained a warrant. At LPI the container cartons were arranged so that only the white tops of the boxes of film could be seen without removing the individual boxes from their container. Mandyck or another FBI agent opened a film box and unsuccessfully sought to "eye view" the reel of film therein. (The evidence reflects that each boxed reel of film was sealed by a piece of tape to keep it from unraveling. Accordingly, before a reel of film could be viewed, the tape had to first be removed.) (R.T. Vol. 1 Supp. at 93, 116, 134, 171, 192, 195, 206.)

On Friday, September 26, 1975, co-defendant Michael Grassi called from Atlanta to ask co-defendant Richard Larson in St. Petersburg, Florida what had delayed the expected shipment of films from Larson. Larson reported that the films had been shipped to the Atlanta warehouse via Greyhound using the name "Leggs, Inc." as consignee—"Legs" being the nickname of a female employee in the Atlanta warehouse. In the past, shipments had been made and received using the name "Leggs, Inc." That same day Larson contacted Greyhound express clerk Joe Harris in St. Petersburg to report the non-receipt of the shipment and to initiate a tracer on the package. He left a name and telephone number. (R.T. Vol. 1 Supp. at 13-14; Vol. 4 Supp. at 5-6; Vol. 7 at C-25, C-29-31.)

Gregory Shults of LPI attempted unsuccessfully to find out the consignor's address since it was fictitious. (Several witnesses explained that a fictitious name on shipment bills of lading was employed to prevent common carrier pilferage which occurred when the name

of a known adult business was used.) Shults also spoke to Griffin Askew, Assistant Terminal Manager for Greyhound in Atlanta, to advise him that LPI was turning the shipment over to the FBI and he gave Askew the local FBI telephone number. (R.T. Vol. 1 Supp. at 31, 35-36, 50, 150, 167, 228-29; Vol. 4 Supp. 5-6.)

The defendants made numerous attempts to retrieve their misdelivered shipment. Ronald Bowman was sent to the Greyhound station in St. Petersburg on Monday, September 29, 1975 to look for the packages. A girl named Joyce telephonically contacted Griffin Askew at Greyhound on three occasions attempting to recover the shipment. Askew, however, had been advised by the FBI not to provide any information about the shipment and to call them if contacted about the twelve boxes. Askew complied with these directives. Defendant Grassi went to the Greyhound station personally three times looking for the package, leaving his name and number. He also contacted LPI on Tuesday, September 30, 1975, and several times thereafter. LPI never admitted that they had the shipment. LPI's Fox apparently received two calls from someone trying to get the films back and specifically recalls speaking to Grassi but he believed their telephone conversation occurred about two weeks after LPI acquired the films. (R.T. Vol. 1 Supp. at 36, 50-52, 125; Vol. 4 Supp. at 6-10; Vol. 7 at C-30, C-138, C-147.)

Agent Mandyck did not review the films in the boxes he seized until December, 1975, even though he was aware the defendants were trying to get their merchandise back. It was not until February, 1976, that Mandyck through the filing of a report notified the United States Attorney's Office in Atlanta, Georgia,

that he had the films in question. An adversary hearing to determine the obscenity *vel non* of the films was never conducted. (R.T. Vol. 1 Supp. at 192, 193, 208; Vol. 7 at C-163.)

The trial judge concluded that petitioner had standing to assert the motion to suppress and return. (See petitioner's testimony, R.T. Vol. 1 Supp. at 223-257.) The motion was denied, however, on the grounds that defendants did not have a reasonable expectation of privacy in the subject materials and "that there was a private search and no Government seizure within the meaning of the Fourth Amendment." (R.T. Vol. 4 at 109-10, 115-16.)

B. Preceding the trial, petitioner filed proposed *voir dire* questions with the court. (C.T. Vol. 2, Doc. 46.)² Some of the proposed questions the judge refused to ask prospective jurors, in addition to their length of residency in the community, were:

"120. In this case you will be asked to view males engaging in homosexual sexual activity. Are you personally familiar with the attitudes and norms of the homosexual community?"

"122. Do you believe your experience is inadequate to judge the appeal of these films to homosexuals unless expert testimony is presented?"

"102. Do you feel the availability in the community of sexually explicit or graphic materials is on the increase or the decrease?"

"103. Does this fact disturb or offend you?"

²"C.T." refers to the Clerk's Transcript of the Record on Appeal, "Vol." refers to the Volume number, and "Doc." refers to the Document Number.

"105. Have you ever known of anyone to have been harmed or hurt in any way by exposure to sexually explicit or graphic materials?"

"111. Will you be able to view films which depict certain sexually explicit activities, including mouth and genital contact, anal intercourse, ejaculation, homosexual activity and interracial sex with open eyes and an open mind?"

"119. What organizations do you belong to in the community?"

C. Midway through the trial the five allegedly obscene films were projected for the jury. At the conclusion of the third film shown the jury, petitioner brought to the Court's attention that Juror Kohring was not viewing the films but had been reading a magazine during the screening. The judge directed him to put away the magazine. Thereafter, Kohring did not view much of the fourth film shown. At that time petitioner's counsel wrote a note to FBI Agent Hod Hunt asking him to observe whether Kohring was watching the fifth film during its screening. Mr. Hunt was instructed not to make this observation by Assistant United States Attorney John Lund and, accordingly, Hunt averted his eyes from the jury box during the showing of this final film. Again, Kohring did not view the screen for more than seconds at a time. (R.T. Vol. 8 at D-123 to D-129.) News personnel in attendance at the trial observed juror Kohring avert his eyes and so reported it. See Affidavit of W. Michael Mayock and newspaper clippings and note to Hunt appended thereto. (C.T. Vol. 2, Doc. 51.)

Petitioner made a motion to replace Kohring with an alternate juror. The court rejected this request saying

Kohring had paid sufficient attention and intimated the jury would screen the films in the jury room during deliberations. Significantly, the jury had no projector in the jury room and so did not see the films again. (R.T. Vol. 11 at G-229.)

D. At the inception of the trial attorney Zell represented co-defendants Grassi and Sanders. Midway through the trial, Grassi, still represented by Zell, entered into a plea agreement with the prosecution on the condition that he testify at trial. Grassi thereafter obtained a new counsel, Hall, who advised him not to waive his attorney-client privilege with Zell since Hall had ascertained from Grassi that Zell could impeach Grassi with other crimes Grassi had confidentially communicated to Zell. At a hearing Grassi advised he would testify if Walter's case were severed from Sanders'. His testimony would have been exculpatory of Walter on the *scienter* issue in that petitioner did not knowingly transport the films by *common carrier* (R.T. Vol. 4 Supp. at 23) and did not know the "nature, character and contents" of the films. (R.T. Vol. 8 at D-10; Vol. 9 at E-3, E-5, E-9, E-117 to E-121.)

Petitioner was prejudiced not only in being tried with Sanders but with Sanders' lawyer as well. Zell was shown to have advised one witness, Maxey, to "take the Fifth" Amendment before the Grand Jury (R.T. Vol. 9 at E-93 to E-94) and to have prepared Government's Exhibit 13 (Appendix E hereto), a letter Zell wrote to an accountant attributing ownership of certain defendant corporations to defendants Grassi and Sanders which the Government contended was false. Petitioner sought unsuccessfully to have a hearing

on Zell's obvious conflicts of interest one month in advance of trial. (C.T. Vol. 2, Doc. 39 at 2.)

E. Viewing the trial evidence in the light most favorable to the Government, there was evidence that petitioner and defendant Sanders were partners who jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses. Defendant Sanders and all other defendants, with the exception of petitioner, were shown to have authorized the shipment of 871 8mm films which culminated in the indictment at bar. There was no evidence that petitioner had ever seen these films or had any knowledge of their nature, character or contents. There was no evidence petitioner exercised any role in the business within either two months before or after the shipment of film. Finally, there was no evidence that any other shipment made by the business contained obscene material.

F. Petitioner proffered at least five jury instructions which sought to have the term "average person" in the obscenity formulation defined as "average adult." (C.T. Vol. 2, Doc. 45.) For example, proposed instruction No. 22 read in pertinent part:

"The term 'average adult person' as used in these instructions is a hypothetical composite person who typifies the entire community including persons of both sexes

"'Adult' means all persons of age of 18 or older."

The trial judge refused to give a charge defining "person" as "adult." The court likewise declined petitioner's proffered instruction No. 48 that if "the jury is unable

to ascertain the meaning of 'the average adult person,' or of 'contemporary community standards' . . . then the Government has failed to prove its case beyond a reasonable doubt." Petitioner had sought to develop on cross-examination of the Government's expert witness that certain terms used in the obscenity test, such as "the average person," were incapable of ascertainment. It was suggested that because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual.

Petitioner asked the court to give the following instruction:

"The predominant appeal to prurient interest is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group."

Instead, the court delivered this charge:

"In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, *beyond a reasonable doubt*, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals." (Emphasis added.)

G. Trial commenced on August 10, 1977, and on August 19, 1977, the jury rendered a verdict finding petitioner guilty on all eleven counts. (R.T. Vol. 11

at G-231.) On October 21, 1977, the Honorable Wm. Terrell Hodges, United States District Judge, after denying petitioner's motions for a new trial and for judgment of acquittal, sentenced petitioner to concurrent three year terms of imprisonment on all counts. That same day petitioner filed a timely Notice of Appeal (C.T. Vol. 2, Doc. 59) and was allowed to remain on \$25,000 corporate surety bail pending the outcome of his appeal. Petitioner duly filed his appellate briefs in the Court of Appeals. The judgment of the District Court was affirmed on April 2, 1979. A timely petition for rehearing with suggestion for determination en banc was denied on June 15, 1979. An order staying the issuance of the mandate was granted on June 22, 1979, provided a petition for writ of certiorari is filed in the clerk's office of this Court on or before July 15, 1979.

REASONS FOR GRANTING THE WRIT.

1. The FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in *Burdeau v. McDowell*, 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure"—that by the third party and that of the government—where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits.

More than fifty years ago in *Burdeau v. McDowell*, 256 U.S. 465, 475, the Supreme Court held "that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure."³ However, when First Amendment concerns are at stake "the most scrupulous exactitude" must be given the constitutional requirements of the Fourth Amendment. *Stanford v. Texas*, 379 U.S. 476, 485. The First Amendment operates as an independent source of restrictions upon the power of the police to take expressive material since a prompt judicial determination in an adversary setting is mandated to obviate prior restraint problems. *Heller v. New York*, 413 U.S. 483, 495. . . . Where, as here, the government acquires films which are the product of a third party search and fails to observe the minimum procedural safeguards prescribed by the Supreme Court the acquisition must be deemed a "seizure" both because it is a deprivation of a legitimate property interest (see *Rakas v. Illinois*, 439 U.S. 128) and

³Dissenting opinion of Judge Wisdom.

because it operates as a prior restraint which upsets reasonable expectations that the property would be subject to prompt judicial return (*Heller, supra*) or would remain private. In short, where First Amendment concerns are involved a two-step analysis of the "seizure" must be made—that by the third party and that of the government—and *Burdeau* applies only in the absence of an independent governmental invasion of privacy rights protected by the Fourth Amendment. The majority opinion of the panel failed to discuss this issue.

As Judge Wisdom's dissent incisively demonstrated, the *Burdeau* rule is an anachronism discredited by commentators.⁴ Its functional twin the "silver platter" doctrine was discarded nearly twenty years ago. *Elkins v. United States*, 365 U.S. 206. Developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau* which was decided when there were few justifications for warrantless seizures. Today our society is expanding, not contracting, its legitimate expectations of privacy. Although *Rakas v. Illinois*, 439 U.S. 128, disapproves "arcane distinctions developed in property . . . law," under *Burdeau* a "seizure" is determined by the *status* of the trespasser—official versus private. It is difficult, if not impossible, to reconcile *Burdeau* with *Shelley v. Kraemer*, 344 U.S. 1 (1948) which held the "state action" doctrine forbids judicial support of certain private acts which, if carried out by government would be unconstitutional. In sum, some flexibility in *Burdeau* is required to accommodate

⁴See, e.g., Note, *Private Searches and Seizures*, 90 Harv. L. Rev. 463 (1976); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 Va. L. Rev. 1314, 1336-59 (1969); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 Stan. L. Rev. 608 (1967).

reasonable modern expectations of privacy, particularly where they intersect First Amendment values.

The Eighth Circuit in *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976) concluded that where a common carrier delivers to the government First Amendment materials uncovered during a private search, the government's acceptance of said items constitutes a "seizure" requiring a warrant. The majority of the panel refused to follow *Kelly* and instead erroneously followed *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (*en banc*) which concluded under similar facts that there was no "seizure." The brilliant dissenting opinion of Judge Wisdom and Note, *Private Searches and Seizures, United States v. Kelly and United States v. Sherwin*, 90 Harv. L. Rev. 463 (1976) both comprehensively analyze these two cases and conclude without reservation that the approach of *Kelly* is preferable to that of *Sherwin* in accommodating both First Amendment rights and the privacy interests of absent third parties.

A. Every action undertaken by the shippers of the films was consistent with an expectation of privacy. The twelve boxes of film were double-wrapped and reenforced to prevent accidental breakage while in transit. *Previous shipments* of film directed to "Leggs, Inc." on a "Will Call" basis *had not been reforwarded* to a Greyhound substation and "*L'Eggs Products, Inc.*" *had not been contacted*. It was reasonable to expect that no one would both claim shipped packages which did not belong to them and then pay the collect charges on those items. Moreover, it was reasonable to assume that Greyhound would not release the shipped cartons to someone who claimed no interest in them and refused

to pay the collect shipping charges due. The employment of a fictitious name on the shipment bills of lading was an earnest attempt to ensure privacy since common carrier pilferage or breakage occurs frequently, as several witnesses testified, when the name of a known adult entertainment business is used on the bill of lading.⁵ Also the assiduous attempts of the shippers to locate their misdirected shipment is demonstrative of their expectation that the merchandise would remain private. Finally, where the "contraband" involved is 8mm films—the indictment did not charge the film box covers with being obscene—the expectation of privacy is at its greatest since (1) the films are presumed legitimate in the absence of a judicial determination to the contrary and (2) *the film frames are too small to be seen without the aid of a projector*. *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). In fact, the FBI chose not to screen the films for two months after their seizure, although they knew appellants were seeking to retrieve their merchandise and even then maintained a reasonable expectation that the films would remain private and would not be viewed by others. See *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977); *United States v. Kelly*, 529 F.2d 1365, 1368 (8th Cir. 1976).

B. The Government, relying heavily on *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) has contended that its acquisition of the films in issue did not fall within the scope of the Fourth

⁵Within a two month period one adult bookstore had seven separate interstate shipments addressed to it as consignee rip open "inadvertently." *United States v. Kelly*, 529 F.2d 1365, 1368 (8th Cir. 1976).

Amendment since there is no "seizure" if property is consensually transferred by a third party to the Government. Alternatively, the Government advanced the third party consent exemption to the warrant requirement of the Fourth Amendment as justification for its seizure of the films. Neither theory has factual underpinning.

Admittedly, employees of L'Eggs Products, Inc. (LPI) voluntarily contacted the FBI to inquire as to what they should do with the misdirected shipment of films in their possession. FBI Agent Mandyck, knowing the shipment was "misdirected" and, accordingly, not rightfully within the possession of LPI, instructed LPI to secure the films in a safe place until the FBI could come by and pick them up. (R.T. Vol. 1 Supp. at 170-71, 107, 133.) However, a "seizure" is not complete until there is an effective appropriation (*Lustig v. United States*, 338 U.S. 74, 78) and the FBI waited five days to appropriate the films. During this hiatus, LPI denied having the films to defendant Grassi, thereby demonstrating their subservience to the government. (R.T. Vol. 4 Supp. at 8-9.) Also Greyhound employee Askew testified he did not tell defendants the whereabouts of the films *per FBI instructions* and Agent Mandyck admitted telling Askew to get the names and phone numbers of those seeking to retrieve the films. (R.T. Vol. 1 Supp. at 50-52, 207-08.) The only rational conclusion that may be drawn from the aforesaid facts is that LPI and Greyhound employees were not acting voluntarily but rather under the command and at the direction of the FBI and that the FBI, knowing the films were wrongfully acquired by LPI, participated in and encouraged their

theft. It is only "[w]here no official of the federal government has any connection with a wrongful seizure or any knowledge of it until after the fact, [that] evidence is admissible." *United States v. Mekjian*, 505 F.2d 1320 at 1327 (5th Cir. 1975). Thus, there was neither a voluntary relinquishment of the films to the FBI nor was there an absence of governmental participation in an illegal seizure.

The Government's suggestion that the FBI acquired the subject films pursuant to a valid third party consent is unsupportable. LPI employees admitted LPI had no entitlement to the packages, the films were taken without paying the freight charges and the cartons were not addressed to LPI. Moreover, Agent Mandyck knew the films were "misdelivered" and retained for five days by LPI while the defendants sought to regain their merchandise. Obviously, the actions of defendants in attempting to retrieve their films were indicative of the fact that *no consent* had been given to LPI to relinquish the films to the FBI. Indeed, if LPI had authority over the films it was clearly lost during the five day interval between the time the FBI was contacted and the time it picked up the films.

C. The majority opinion claims that the acquisition of the twelve cartons of film by the FBI from LPI was not a "seizure" under the holding of *Sherwin*, *supra*, since it was the product of a voluntary relinquishment. This holding of *Sherwin* is not without detractors. *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc); *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976); *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977); *Private Searches and Seizures: United States v. Kelly and United States v. Sherwin*, 90 Harv. L. Rev. 463 (1976).

"Placing the Government's acceptance of printed materials outside Fourth Amendment constraints allows for the possibility of Government sanctioned private censorship without judicial supervision," "might deter the dissemination of legitimate expression via interstate common carriers," and "presents a problem of prior restraint." 90 Har. L. Rev. at 467. All of the concerns expressed above were set in motion in the case at bar when LPI turned over to the FBI the cartons of film it wrongfully withheld from defendants. "Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." *McSurely v. McClellan*, 553 F.2d 1277, 1291 (D.C. Cir. 1976) (en banc).

The Harvard Law Review article in finding the approach of *Kelly* preferable to that of *Sherwin* criticizes the absolutist scope of the *Burdeau v. McDowell* exemption, concluding that developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau*. Furthermore, the article characterizes the government's conduct in *Kelly* and *Sherwin* as a "seizure" because it constituted a deprivation of the defendants' property interests. These property interests help define the scope of the right to privacy and must be presumed legitimate where First Amendment material is involved. Accordingly, the Government's appropriations in *Kelly*, *Sherwin* and the case at bar were "seizures." 90 Harv. L. Rev. at 467-72.

2. The FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth

Amendment as had been held in a similar case by the Eighth Circuit as well as a "search" within the teaching of *United States v. Chadwick*, 433 U.S. 1.

After obtaining the subject 8-mm films from L'Eggs Products, the FBI waited two months to screen the films to ascertain what they had. The individual frames of 8-mm film were too small to be seen with the naked eye. Although the box covers for the films purported to describe in graphic fashion the content of the respective films, the box covers were entitled to a presumption of non-obscenity (*Roaden v. Kentucky*, 413 U.S. 496), were never charged as being obscene and, moreover, did not present probable cause for the issuance of a warrant. *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977).

In *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977), the FBI, having been contacted by a common carrier who had discovered sexually explicit films and having brought a projector to the common carrier's office where they screened the films without first obtaining a warrant, was held to have conducted a separate, independent search which was illegal since no exception to the warrant requirement existed. The majority opinion of the panel purports to distinguish *Haes* by declaring that L'Eggs employees had fully ascertained the nature of the films *even though they had never screened them*. Therefore, the majority concludes, "the FBI's subsequent viewing of the movies on a projector did not 'change the nature of the search' and was not an additional search subject to the warrant requirement." It is obvious that the FBI both changed the nature of the search and conducted an additional search when they projected films that had never been viewed

by L'Eggs employees. *A fortiori*, the two-month hiatus between acquisition and screening negated the possibility that one continuous search transpired.

The majority opinion also attempts to distinguish *United States v. Chadwick*, 433 U.S. 1 (1977) by declaring that "the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant." This argument is flawed for the same reasons set forth above. Moreover, this interpretation of *Chadwick* would emasculate the decision. In *Chadwick* a *one-hour* delay in conducting a warrantless search of a footlocker for drugs was held to be too long. How can it possibly be said that a *two month* delay in conducting a warrantless search of presumptively protected First Amendment material was not too long?

A. Assuming, *arguendo*, that LPI validly consented to the FBI's *seizure* of the subject films, there was no consent to the FBI's *search* of the films which occurred when they were screened two months later. Neither the FBI nor anyone at LPI knew the contents of the films since the 8mm film frames could not be seen with the naked eye. (R.T. Vol. 1 Supp. at 65, 119, 137, 155.) In addition to not being charged as being obscene, the film box covers did not present probable cause for one to entertain the belief that the films were obscene. *United States v. Tupler*, 564 F.2d 1294, 1297-98 (9th Cir. 1977). However, during the two-month period prior to the screening of the films the FBI was cognizant that defendants were seeking the return of their films. Accordingly, any *imputed* consent must be deemed *revoked*. *Mason v. Pulliam*,

557 F.2d 426 (5th Cir. 1977) (taxpayer who consented to IRS possession of his papers for examination may withdraw his consent and reinvoke his Fourth Amendment rights as to all papers not then viewed or copied). Employing the logic of *Mason* to the case at bar it is clear the FBI viewed the films without the defendants' consent and that search is properly a subject of suppression.

B. If the Government undertakes any new or different searches after being apprised that contraband has been unearthed in a private search, then a warrant is required unless an exception to the warrant requirement exists. *United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977).

The opening of the film boxes by FBI agents and their unsuccessful attempt to "eye view" the contents of one of the 871 films at LPI places the government outside the scope of *Sherwin*, since there "[w]hen the agents arrived they did not conduct a more extensive search." *Sherwin*, *supra*, at 6-7. There is only *one chance* in 871 that the FBI did not conduct a more extensive search. Those are the odds against the FBI selecting the same film to "eye view" as did LPI employee Shults. Moreover, only five of the 25 different film titles were charged with being obscene. There was only a 20 percent chance that a charged film was "eye viewed."

C. The FBI's subsequent screening of films it received from LPI constituted a "search" prohibited in the absence of a warrant by the Fourth Amendment. Common sense dictates that this be so. Until the films were projected on a screen there was *no probable*

cause to believe a crime had been committed,⁶ so how could the viewing of the films not be a "search"?

In both *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) and *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976) FBI agents simply reinspected magazines and books which had already been examined by freight agents. Significantly, in the case at bar the film box covers were not charged with being obscene and the film could not be "eye viewed." Therefore the FBI, unlike the situation in *Sherwin* and *Kelly*, was unable to judge the material either taken as a whole or at all for that matter. In screening the films the FBI engaged in a secondary search similar to the one condemned in *United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977). If anything, however, the instant search was more unreasonable since the Government never attempted to obtain a warrant, conceded there were no exigent circumstances, held the films for two months before viewing them and confessed that a warrant could have been obtained had one been sought.

Even if *Sherwin* is accepted as the controlling authority on the "seizure" issue, it does not mean the FBI's subsequent screening of the films was not a "search" governed by the Fourth Amendment. More exacting standards apply to searches and seizures of First Amendment-protected materials than to narcotics, gambling paraphernalia and other contraband. *Roaden*

⁶The box covers for the film were entitled to a presumption of non-obscenity (*Roaden v. Kentucky*, 413 U.S. 496 (1973)), were not charged as being obscene and did not present probable cause for the issuance of a warrant. (*United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977).) The film itself could not be seen with the naked eye.

v. Kentucky, 413 U.S. 496 (1973); *Stanford v. Texas*, 379 U.S. 476 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). Also Fourth Amendment "search" and "seizure" issues are appropriately subjected to bifurcation. For example, in *United States v. Chadwick*, 433 U.S. 1 government agents had probable cause to believe defendants' footlocker contained contraband and, accordingly, they seized it at the time they arrested the defendants, but delayed their search of the luggage for *one hour* after the seizure. Since the police seizure was incident to an arrest it was exempt from the Fourth Amendment warrant requirement. The delayed warrantless search of the footlocker, however, did not fall within the compass of any recognized exception to the warrant requirement and was held constitutionally defective.

The lesson of *Chadwick* is instructive in the instant case. A sealed box of film is like a sealed trunk. It is immaterial that a Government acquisition be deemed a voluntary relinquishment or a consent seizure or a seizure incident to arrest, in all cases a warrant to seize is not mandated. But a warrantless search of the acquired items which contain potential contraband may not be delayed unless a search warrant is first obtained. In postponing their search of the subject films for two months, the FBI lost any possible exemption from the search warrant requirement of the Fourth Amendment it might have asserted. Therefore the search was illegal.

3. The Government by appropriating presumptively protected First Amendment material received from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty

for which is suppression of the materials' use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

There exist a plethora of cases that restrict the Government's possession of another's First Amendment materials to situations where a prompt adversary hearing is available so that prior restraint will not occur. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Heller v. New York*, 413 U.S. 483 (1973); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Stanford v. Texas*, 379 U.S. 476 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Speiser v. Randall*, 357 U.S. 513 (1958).

In its second opinion filed June 15, 1979, the majority of the panel cite a number of lower court decisions which hold that when materials are seized in violation of the First Amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial. The cases cited involve the seizure of expressive matter pursuant to warrant but without an adversary hearing. Clearly the case at bar is distinguishable from these cases not only in that no warrant was involved but also importantly, in that the government held the appropriated materials for one and one-half years before an indictment was returned. In footnote seven of his dissent Judge Wisdom suggests that "*Heller* and *Roaden* may obliterate any distinction between violations of the First and Fourth Amendments when a seizure of expressive matter is defective for

lack of a determination of probable obscenity by a neutral magistrate."

It also appears that no court has ever considered whether suppression of evidence is an appropriate remedy for a prior restraint under the Due Process Clause of the Fifth Amendment. Yet this Court in *United States v. Russell*, 411 U.S. 423, 431-32, stated, "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952). . . ." It is submitted that the massive nature of the seizure herein (871 films were taken), the fact only five of the twenty-five film titles were ever charged with being obscene, the government's knowledge that defendants were seeking return of their property, the failure of the government to give either direct notice to petitioner that it had his property if he wished to claim it or to place a notice of seizure in a newspaper of general circulation (cf. *Sniadach v. Family Finance Corporation*, 395 U.S. 337; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306), and the government's failure to seek an obscenity *vel non* determination from a neutral magistrate during a two-year period manifest the government's intention to impose nonjudicial suppression of a citizen's presumptively protected First Amendment property without affording the citizen the niceties of procedural due process. The result, particularly when coupled with First and Fourth Amendment considerations earlier addressed, is shocking to the conscience and in violation of due process under the Fifth Amendment. The sup-

pression of the appropriated films as evidence is a just and proper remedy under the circumstances of this case.

4. In an obscenity prosecution *derivative* proof of scienter solely through evidence of petitioner's participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

The Circuit's opinion erroneously equates an individual's *agreement* to participate in a presumptively legal business venture with guilty *knowledge* of a solitary criminal violation occurring in the course of the operation of that business by others. "In general an individual defendant may be criminally liable on the basis of an act or omission of another person, only if it appears beyond reasonable doubt that he willfully ordered or directed, or willfully authorized or consented to, *the act or omission in question*." Devitt & Blackmar, *Federal Jury Practice and Instructions*, Vol. 1, § 12.09 (1977) (emphasis added). There is *NO* evidence that petitioner ordered, directed, authorized or consented to "the act in question" (the September 25, 1975, interstate shipment of obscene films) since all evidence touching upon him dealt with time frames either *two months before or two months after* the shipment date. Instead, the evidence shows other defendants directed the shipment in question.

The evidence recounted in the Circuit's opinion shows at most petitioner's involvement in a legal enterprise

which dealt in all situations except the one at bar in material presumptively protected by the First Amendment.⁷ *Roaden v. Kentucky*, 413 U.S. 496. It strains credulity to suggest this evidence and nothing more proved beyond a reasonable doubt that on September 25, 1975, petitioner: (1) *Knew* "the contents, character and nature" of the subject films he was never shown to have seen (*Hamling v. United States*, 418 U.S. 87, 123); (2) *Knowingly* used a common carrier to ship these obscene materials interstate; and (3) *Knowingly* transported these obscene materials interstate for the purpose of sale or distribution. The panel's determination that scienter in First Amendment cases may be proved derivatively by a pattern of non-criminal activity removed in time from the incident charged vitiates the scienter requirement spelled out by this Court. *Hamling, supra*; *Smith v. California*, 361 U.S. 147 (1959).

⁷It is patent that in calculating whether obscenity exists the material must be taken as a whole (*Miller v. California*, 413 U.S. 15) and an individual's subjective belief in the obscenity of material is irrelevant. (*Clicque v. United States*, 514 F.2d 923 (5th Cir. 1975).) The recitation of testimony relating to the contents of warehouses and bookstores is irrelevant since such material cannot be seen as a whole (*United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977)), nor can it be known to have traveled in interstate commerce at the direction of defendants herein, nor can it be known whether said material is hard-core or soft-core. Indeed, under the law it must be *presumed* that such material is *not* obscene. *Roaden v. Kentucky*, 413 U.S. 496. Accordingly, there can be *no conspiracy with regard to such material not before the court* since a conspiracy involves an agreement to commit an illegal act, and there is nothing illegal about material presumptively protected by the First Amendment. Therefore, the conspiracy charge as to petitioner (and, of course, as to the other defendants) rises or falls on whether he (or they) can be tied to the September 25, 1975, shipment of twelve cartons of film, which is the only "object" of the conspiracy it is permissible to consider.

5. In an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the more of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States*, 436 U.S. 293, that the community includes all adults who comprise it since "person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

Appellants submitted at least five jury instructions seeking to have the court define "average person" as meaning "average adult." *Pinkus v. United States*, 436 U.S. 293 said the community includes all adults who comprise it and "it was error to instruct the jury that [children] were a part of the relevant community." By failing to instruct the jury to consider only "adults" in calculating the composition of the contemporary community, the trial judge left open for the jury's speculation whether "person" included "children." Anyone who understands the English language recognizes that "children" are subsumed within the class "person." Accordingly, if the jury failed to include children as part of the contemporary community, they would have to have disobeyed the court's instructions. It is more likely than not that the jury followed the trial judge's directives. In doing so they necessarily considered "children" as part of the community and thereby rendered a verdict which must be struck down for the reasons set forth by this Court in *Pinkus*.

The panel's opinion quotes from instructions using the words "average person" and "average and normal attitude toward, and an average interest in, sex" and

contends that these words limited consideration to adults. That is not the case, however. Taken in context what the quoted instructions did was to differentiate the non-deviant community from the deviant community. Moreover, even if the panel's viewpoint is accepted as correct, the instructions make it possible for a jury to conclude that the "average person" has some of the attributes of a child. This is exactly what was condemned in *Pinkus*. More significantly, even if a jury could have concluded that "person" meant "adult," it cannot be certain that this is what it *did* do since its verdict was a general one. *Sandstrom v. Montana*, U.S.

6. In an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

The opinion of the Circuit omitted entirely a discussion of the manifestly erroneous jury instruction which directed that prurient appeal be measured by the standards of the average person when the films were clearly directed to a deviant group. *A fortiori*, the instruction given precluded any consideration whether the films had a prurient appeal to members of the homosexual community.

All the subject films depicted male homosexual conduct exclusively and it was undisputed that the *intend-*

ed and probable recipients of the films were homosexuals. The court, over objection, instructed in essence that prurient appeal is to be judged with reference to the average person instead of only to members of the intended deviant recipient group contrary to the teaching of *Mishkin v. New York*, 383 U.S. 501, and *Pinkus v. United States*, 436 U.S. 293 (error to include children as part of community for purposes of determining prurient appeal unless children shown to be intended and probable recipients). The court admonished the jury that *before* pruriency could be assessed in terms of sexual interest of the intended and probable recipients of the films, *i.e.*, homosexuals, there must be *proof beyond a reasonable doubt* that the films were "*intended to appeal to the prurient interest*" of homosexuals.⁸ Whether the maker of the films *intended* them to appeal to the prurient interest of homosexuals is not only irrelevant but impossible to ascertain. Accordingly, since such an intent could not be proved beyond a reasonable doubt, the jury was foreclosed from assessing whether the films appealed to the prurient interest of members of the homosexual community. The consequence of requiring proof of intent beyond a reasonable doubt "was to unconstitutionally shift the burden of persuasion to petitioner such as was done in *Mullaney v. Wilbur*, 421 U.S. 684." See *In re Winship*, 397 U.S. 358, 364.

⁸The court instructed as follows:

"In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals."

7. A juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be "*taken as a whole*" under the directive of *Miller v. California*, 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

There is substantial evidence that Juror Kohring was reading a magazine and staring at the floor during much of the time when the five films in question were screened in court for the jury. It was the only occasion on which the jurors saw these films.

Under the facts presented a magistrate seeing only what Kohring saw would not have *probable cause* to issue a warrant to seize the film. *United States v. Tupler*, 564 F.2d 1294, 1297-98 (9th Cir. 1977). This is because *Miller v. California*, 413 U.S. 15, requires that a film be taken *as a whole* with regard to application of the third prong value test of the obscenity formulation. If Kohring did not have probable cause to believe the films obscene, then *a fortiori* he could not have found them obscene *beyond a reasonable doubt* and petitioner was deprived of his Fifth Amendment rights.

Juror Kohring was *incompetent* to render a judgment regarding the obscenity *vel non* of the films. Moreover, Kohring should have been replaced by an alternate juror who was not so obviously *prejudiced* against the defense since petitioner was entitled under the Sixth Amendment to an *impartial* jury.

8. In an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States*, 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

The trial court erred in failing to ask the requested *voir dire* questions propounded by petitioner particularly as they related to the jurors' length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure (since comparison evidence was not allowed to be introduced), opinion as to whether sexually explicit matter causes harm, their knowledge of the mores, customs and practices of the homosexual community and their opinion whether sex-questions to the veniremen. *Smith* leaves the decision *States*, 431 U.S. 291, 308, mandates that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen, *Smith* leaves the decision of the propriety of a particular question to the discretion of the trial court. It must be noted the trial herein occurred in Florida at the time of Anita Bryant's Crusade. It was therefore especially important to peti-

tioner to obtain answers from the jurors to specific and focused questions dealing with their beliefs, experiences and prejudices. The *voir dire* questions submitted to the trial court by petitioner were the very sort of questions *Smith* indicated were proper. The failure of the court to ask these proffered questions of the veniremen undoubtedly prejudiced petitioner. Perhaps if the Court had allowed Appellant Walter's Requested *Voir Dire* Question 111 ("able to view . . . with open eyes and an open mind.") (C.T. Vol. 2, Doc. 45 at 14), the Kohring incident would not have happened.

9. Due process of law under the Fifth Amendment required that petitioner's case be served from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the *scienter* issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders.

At least five grounds necessitated the severance of petitioner's case from that of defendant Sanders. First, Sanders was the subject of much adverse pre-trial publicity. Second, trial testimony depicted Sanders as having threatened a witness. Third, hearsay statements by Sanders were improperly admitted against Walter, contrary to *Bruton* requirements. Fourth, Sanders was represented by an attorney who told a prosecution witness to "take the Fifth Amendment"

and who drafted a Government trial exhibit which the Government contended was false. Fifth, had there been a severance co-defendant Grassi would have testified without fear of impeachment by his former attorney Zell to exculpate Walter on the *scienter* issue regarding his knowledge of the shipment and the character of its contents *prior* to its misdelivery. Each of the aforesaid grounds would warrant a severance; collectively, they cry out for it. A severance should have been granted under Rule 14, Fed. R. Crim. P., since petitioner's joint trial with defendant Sanders and his counsel was so prejudicial that it was a clear abuse of discretion not to grant a severance. See, *e.g.*, *United States v. Marshall*, 532 F.2d 1279 (9th Cir. 1976).

10. The refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

One defense theory in the case was that certain terms in the obscenity formulation were incapable of ascertainment. For example, the defense contended both during cross-examination and final argument that it is impossible to calculate "the average person" and because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual. "The average person" differs from "the average reasonable man" of tort law not only because the term is a logical impossibility, but

also because it must be proved beyond a reasonable doubt instead of by a preponderance of the evidence.

When a defendant requests an instruction on a particular defense theory, he is entitled to receive it unless it is unsupported by the evidence. *United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976) (because cross-examination provided sufficient basis for defense theory, failure to instruct was error); *United States v. Levy*, 578 F.2d 896, 903 (2d Cir. 1978). In the case at bar defendants' cross-examination of the prosecution's expert witness directed itself at the impossibility of calculating "the average person." Therefore, defendants were entitled to their requested instruction on a defense theory of the case.

Conclusion.

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

W. MICHAEL MAYOCK,

Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals, Fifth Circuit.

United States of America, Plaintiff-Appellee, v. Arthur Randall Sanders, Jr., Gulf Coast News Agency, Inc., Trans World America, Inc., a/k/a TWA, Inc., and William Walter, Defendants-Appellants. No. 77-5715.

April 2, 1979.

The United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., convicted defendants of conspiracy, knowingly using common carrier to ship obscene materials interstate, and knowingly using common carrier to transport obscene matter interstate for purpose of sale or distribution, and defendants appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) search by corporation's employees constituted a private search beyond scope of Fourth Amendment; (2) FBI acceptance of films was not a "seizure" within meaning of Fourth Amendment; (3) Government's viewing of films on movie projector did not constitute separate independent search requiring warrant; (4) evidence was sufficient to sustain conviction, and (5) district court properly instructed jury on contemporary community standards.

Affirmed.

Wisdom, Circuit Judge, filed a dissenting opinion.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge:

Arthur Sanders, William Walter, Gulf Coast News Agency, Inc. ("Gulf Coast News") and Trans World America, Inc. ("TWA") appeal their convictions under 18 U.S.C. § 371 for conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene matter interstate for the purpose of sale or distribution, in violation of 18 U.S.C. § 1465. Sanders, Walter and Gulf Coast News also challenge their convictions for substantive violations of sections 1462 and 1465.¹ Appellants all allege an unconstitu-

¹Under 18 U.S.C. § 371,

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1462 provides in pertinent part that

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or . . .

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1465 provides that

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined

tional search and seizure and attack the district court's jury instructions on obscenity; appellant Walter further contends that he "was not shown to possess the requisite scienter." We find these assertions to be without merit and therefore affirm the convictions.

I. Facts

According to the testimony at trial, on September 15, 1975, Richard Larson, the manager of appellant Gulf Coast News, located in St. Petersburg, Florida, ordered an employee to deliver 12 cartons, containing a series of 8 mm. films entitled "David's Boys,"² to Greyhound Bus Package Express in St. Petersburg for shipment to Atlanta. The packages had a nonexistent return address and named a fictitious corporation, "D and L Distributors," as shipper. Described as containing printed matter, they were sent on a "will call" basis to "Leggs, Inc.," another fictitious company. "Legs" was the nickname of a female employee at appellant TWA's Atlanta headquarters. When the cartons reached Atlanta, Greyhound forwarded them to a branch station located near L'Eggs Products, Inc. ("L'Eggs"), a manu-

not more than \$5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

²The series "David's Boys" included 25 individual movie titles. The 12 cartons contained 871 reels of film.

facturer of women's hosiery and regular customer of Greyhound Package Express. After Greyhound informed L'Eggs of the shipment, Michael Horton, a L'Eggs Products employee, came to the terminal, opened one of the cartons and discovered that it contained sexually explicit movies. Horton returned to the L'Eggs office and described the package's contents to a superior, William Fox. Concerned that his company might be implicated in the transportation of pornographic films, Fox drove to the Greyhound station and brought the 12 cartons to the L'Eggs office. He and several other employees opened all the packages and found individual boxes of film. The top of each film box showed the name "David's Boys" and a drawing of two nude males embracing and kissing; on the back of each were the title of the individual movie and a detailed description, in explicit terms, of the bizarre homosexual acts depicted in the film. Fox then telephoned the FBI, explained the nature of the films and asked "them to come out and take the materials away." The FBI procured the films on October 1, 1975, and subsequently viewed them on a projector at its offices. No warrant was obtained.

Appellants Walter and Sanders, who jointly operated appellants TWA and Gulf Coast News, were indicted along with both corporations under 18 U.S.C. § 371 on one count of conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene matter interstate for the purpose of sale and distribution, in violation of 18 U.S.C. § 1465. Gulf Coast News, Walter and Sanders were also charged with five counts of substantive violations of section

1462 and five substantive violations of section 1465.³ The jury convicted TWA of conspiracy and returned guilty verdicts as to Walter, Sanders and Gulf Coast News on all eleven counts. The district court fined TWA \$10,000, Gulf Coast News \$33,000 and sentenced both Walter and Sanders to three years in prison on each count, to run concurrently.

II. *The Constitutionality of the Search and Seizure*

Appellants first urge that the district court committed reversible error in failing to suppress the five films admitted in evidence at trial. Since appellants TWA and Gulf made no pretrial motion to suppress, they cannot raise this issue on appeal. *United States v. Bush*, 5 Cir., 1978, 582 F.2d 1016, 1018. Though appellants Sanders and Walter each made a timely motion to suppress and return the films, the district court sought to determine at the outset whether they had standing to challenge the constitutionality of the search and seizure. To establish such standing under traditional Fourth Amendment analysis, a defendant must either show presence on the searched premises at the time of search, allege a proprietary or possessory interest in the premises or objects searched or be charged with an offense that includes as an essential element possession of the seized evidence at the time of the contested search and seizure. *See Brown v. United States*, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973); *United States v. Hunt*, 5 Cir., 1974, 505 F.2d 931, 939-40. "Generally, a defendant satisfies the standing requirement if he has

³The five counts under section 1462 and the five section 1465 counts enumerated the same five movies from the "David's Boys" series: "Look at the Birdie," "The Clean Up," "Black Rape," "The Massage," and "Loving Hands."

an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy." *United States v. Hunt*, *supra*, 505 F.2d at 938.

In denying appellants' suppression motion, the district judge held that "shipping or causing or suffering to be shipped by a common carrier . . . with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy. Or, stated another way, it seems to me that it was reasonably foreseeable that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be misdelivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded." There is merit in the district court's conclusion. However, the Supreme Court has recently "dispens[ed] with the rubric of standing . . . by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine," *Rakas v. Illinois*, U.S., 99 S.Ct. 421, 429, 58 L.Ed.2d 387 (1978) so we will focus "on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.*, U.S. at, 99 S.Ct. at 428.

A. The Search by L'Eggs Products Employees

Appellants Sanders and Walter argue that the L'Eggs Products employees, in opening the 12 cartons and examining their contents without a warrant, conducted an unconstitutional search. The Fourth Amendment's

warrant requirement, of course, is intended solely "as a restraint upon the activities of sovereign authority," *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921), and "a search . . . conducted by a private individual for purely private reasons, . . . does not fall within the protective ambit of the Fourth Amendment." *United States v. Lamar*, 5 Cir., 1977, 545 F.2d 488, 489-90; *United States v. Jones*, 5 Cir., 1972, 457 F.2d 697, 699; *Barnes v. United States*, 5 Cir., 1967, 373 F.2d 517, 518. However, if under the circumstances of the case the private party "acted as an 'instrument' or 'agent' of the government," the ostensibly "private" search must meet the amendment's standards. *United States v. Bomengo*, 5 Cir., 1978, 580 F.2d 173, 175. See *Lustig v. United States*, 338 U.S. 74, 79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949). Before the L'Eggs Products employees ever contacted the FBI, they had on their own initiative taken the shipment of films from the bus terminal, opened the cartons, examined the individual film boxes and ascertained the nature of the films. Since "there is no indication in the record" that in so doing the L'Eggs employees "acted at the behest or suggestion, with the aid, advice or encouragement, or under the direction or influence of the F.B.I.," we conclude that these activities constituted a private search, beyond the scope of the fourth amendment. *United States v. Clegg*, 5 Cir., 1975, 509 F.2d 605, 609.

B. F.B.I. Acceptance of the Films

Nevertheless, Sanders and Walter contend that the FBI unconstitutionally seized the films, by accepting them from the L'Eggs employees without obtaining a warrant. In making this assertion, they rely principally

on the Eighth Circuit's decision in *United States v. Kelly*, 1976, 529 F.2d 1365. There, an employee of a common carrier discovered that a ripped-open carton of goods contained sexually explicit books and magazines and called the FBI, which sent an agent who examined several of the magazines and retained samples, without obtaining a warrant. Although the *Kelly* court said that the common carrier's search was private, it held that the Government's subsequent acceptance of the fruits constituted a seizure requiring a warrant, "unless there are special circumstances which excuse compliance with the . . . warrant requirement," decided that no exception to that requirement applied and concluded that the warrantless "seizure" was "so unreasonable as to necessitate the operation of the exclusionary rule." *Id.* at 1371.

The result in *Kelly* conflicts with the reasoning implicit in a long line of private search decisions by the Supreme Court and this circuit. In every such case, introducing the fruits of a private search as evidence was impossible unless the private party had at some point surrendered the articles to the Government. Yet neither we nor the Supreme Court have ever held that government acceptance of those articles constitutes a seizure requiring compliance with the warrant requirement, even in cases where no exception to that requirement would have covered the Government's action. See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *United States v. Lamar*, 5 Cir., 1977, 545 F.2d 488; *United States v. Blanton*, 5 Cir., 1973, 479 F.2d 327; *Barnes v. United States*, 5 Cir., 1967, 373 F.2d 517. Thus, we decline to accept the *Kelly* court's analysis.

In *United States v. Sherwin*, 9 Cir., 1976, 539 F.2d 1, the Ninth Circuit, sitting en banc, also rejected the *Kelly* rationale. *Sherwin* also involved a common carrier employee who examined the contents of damaged packages, discovered sexually explicit books and called the FBI, which sent agents who removed two books from the shipment, without a warrant. Citing *Kelly*, the *Sherwin* defendants argued on appeal that "a seizure to which the fourth amendment is applicable occurred . . . when the F.B.I. agents obtained the two books" from the common carrier, *id.* at 7, but the Ninth Circuit did "not regard the government's acceptance of materials obtained in a private search to be a seizure" and concluded that "the fourth amendment [is] not implicated when articles discovered in a private search [are] voluntarily turned over to the government." *Id.* We agree with the Ninth Circuit's reasoning. Under the circumstances, we hold that the FBI's acceptance of the "David's Boys" films from the L'Eggs employees was not a seizure within the meaning of the fourth amendment.

C. Viewing of the Films

Appellants Sanders and Walter further assert, basing their argument on another Eighth Circuit case, *United States v. Haes*, 1977, 551 F.2d 767, that the Government conducted an additional unconstitutional search by viewing the films on a movie projector without obtaining a warrant. In *Haes*, the employee of a common carrier, seeking to identify the consignee of a shipment, opened a package, discovered sexually explicit films and contacted the FBI, which sent two agents with a movie projector to the common carrier's office, where the films were screened without first obtaining a warrant. Declaring that "the inquiry must be whether

the government" thereby undertook "any new or different searches," the Eighth Circuit said that the Government's viewing of the films "changed the nature of the search," because the private search had involved no such screening, and held that the search was illegal, since no exception to the warrant requirement applied. *Id.* at 773-74.

Unlike *Haes*, however, where the private party "had not viewed the films and had not attempted to make a decision as to whether or not they were obscene," *id.* at 771, the L'Eggs employees were able to make "a determination of possible obscenity prior to turning the films over to the FBI," *id.* at 772, by examining the individual boxes containing the films. In this case, the legend "David's Boys" and a cartoon of two nude males kissing and embracing appeared on one side of each film box; the other side carried the title of the individual film and a detailed description, in language of the utmost explicitness, of the bizarre homosexual acts depicted in the movie.⁵ Under these circum-

⁴In announcing its holding on this issue, the *Haes* majority emphasized the factual circumstances and noted that "[w]e would feel otherwise if the private search had included any sort of viewing of the films and a determination of possible obscenity prior to turning the films over to the F.B.I." 551 F.2d at 771-72. Under the factual circumstances here, however, the L'Eggs employees did not need actually to screen the films to make that determination. The Eighth Circuit stressed that *Haes* "was not the case" where "the private employee had tangible evidence upon which to believe that the material was being illegally transported in interstate commerce," *id.* at 772 n.1, but here, in contrast, the individual film boxes amply supported the belief of the L'Eggs employees that such illegal transportation had occurred.

⁵The indictment listed five of the 25 "David's Boys" titles included in the shipment. The individual boxes containing "Look at the Birdie" said that

Corbett really gets turned on when Rich comes over for a photo session. In the a—close-ups you won't believe!

stances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not "change the nature of the search" and was not an additional search subject to the warrant requirement.⁶ We have held that the re-

The highlight of the movie happens when Corbett masturbates and—on Rich's face! This is a flick you will not forget.

"The Clean Up (3 white)" boxes read that

Lenny and Eric turn each other on and when you see these good looking studs you'll know why!!! The action gets heavy and then Les enters the picture.—galore and Les cleans it up like you've never seen. Great close-ups!

The "Black Rape" (1 blk. 1 wht.) boxes stated that

Big Black Lance as 11"—but it doesn't take long before the small slender Larry is taking it all right up the . . .! Good tongue action and a surprise that you won't believe. You will love the close-up action.

The boxes containing "The Massage" explained that

Angelo the masseur gets turned on as he gives Tommy a rubdown. Angelo's expert tongue & hands soon have Tommy's . . . hard & excited. But he wants it the Greek way and Angie complies. Then he . . . beautiful on Tommy's face! This is one of the best close-ups of french love you will ever see!!

Finally, the "Loving Hands" boxes said that

Murray and Carl are well into their love session when Ben enters the room. He will show you his loving hands as he shoves them with his arms . . . (just short of his elbows!) right up his friends' a.... h.....!! While they masturbate! It is a true masterpiece for the avid connoisseur!!

(Certain particularly salacious words have been deleted by the writer of this opinion as indicated.)

⁶We note as well the question posed by then Judge Webster in his *Haes* dissent:

Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search inde-

(This footnote is continued on next page)

opening and reinspection of a bag by government authorities following a private search does not constitute a separate, independent search requiring a warrant. *United States v. McDaniel*, 5 Cir., 1978, 574 F.2d 1224, 1226-27; *United States v. Blanton*, 5 Cir., 1973, 479 F.2d 327, 328. These decisions support our conclusion on this issue, for in our view, "much less than reopening and reinspection of the box and its contents was the activity of the FBI" here.⁷ *United States v. Pryba*, 1974, 163 U.S. App.D.C. 389, 399, 502 F.2d 391, 401.⁸ See also *United States v. Ford*, 10 Cir., 1975, 525 F.2d 1308, 1312.⁹ [See next page for fn. 9.]

pendent of the lawful private search which produced the object? I think clearly not.

The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed. 551 F.2d at 772-73.

⁷The Supreme Court's decision in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) does not affect the outcome of this case. In *Chadwick*, the federal agents gained exclusive custody of property still to be searched, whereas here, the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant. (See also *United States v. Johnson*, 5 Cir., 1979, 588 F.2d 147.

⁸In *Pryba*, a nervous shipper, reluctant to disclose the contents of a box, aroused the suspicions of an air freight clerk in San Francisco. The clerk's supervisor opened the box and found "unpackaged reels of 8-millimeter color movie film bearing titles unsubtly suggesting sex." The supervisor held two films up to the light and saw both hetero- and homosexual nude couples "engaging in sexual acts." He called the FBI, which sent an agent with a movie projector to the freight carrier's office. After watching two more movies, with the FBI agent still present the supervisor repackaged the films and replaced the boxes in transit to Washington. 163 U.S.App.D.C. at 393, 502 F.2d at 395. Judge Spottswood Robinson first concluded that the activities of the clerk and his employer before the FBI brought the movie projector constituted a private search and then declared that "we are unable to perceive in the subsequent events any new or different

III. Walter's Scienter

Appellant Walter contends that there was insufficient evidence to sustain his conviction, because the Government failed to establish a "close nexus" between him and "a specific shipment of proved obscene matter" and because there was no evidence as to scienter. This assertion is meritless, as there was ample evidence to support the jury's finding that Walter knowingly used a common carrier to ship obscene materials interstate, knowingly transported obscene matter interstate for the purpose of sale or distribution and knew the obscene nature of the films shipped interstate.

search after the F.B.I. agent arrived. There is respectable authority holding that not even a reopening and reinspection of a package by federal officers, after the initial opening and inspection by airline personnel entirely on their own, constitutes a separate or additional search subject to Fourth Amendment requirements. We need not venture nearly so far, for much less than reopening and reinspection of the box and its contents was the activity of the FBI in the instant case." *Id.* 163 U.S.App.D.C. at 399, at 401.

⁹In *Ford*, as in *Pryba*, a nervous shipper, at first unwilling to identify the contents of a package, led an air freight supervisor to unwrap the box. He discovered "about eight prophylactics, six or seven inches long, containing a powdered substance," and called the local police. When the officers arrived, they conducted an "on-the-spot field test" which "showed that the substance was heroin." 525 F.2d 1308. Rejecting the assertion that the agents thereby conducted an illegal, warrantless search, the Tenth Circuit said that the "government agents appeared only after the suspicion of the possible presence of contraband was confirmed by discovery of the prophylactics. At this point, it was the province and indeed the duty of the officers to further investigate the open box, which they did without any invasion of protected rights of privacy, to determine whether the suspicious substance in plain view was in fact contraband In these circumstances, we are unable to perceive any new or different search after the government agents arrived." *Id.* at 1312. Similarly, the FBI agents here, in viewing the films on a projector, were attempting to confirm or dispel the suspicion, first developed by the L'Eggs employees, that the films had been transported illegally.

According to the testimony at trial, Walter and Sanders jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses, which included appellants TWA and Gulf Coast News. Ernest Golden, who had served as accountant and bookkeeper for these various enterprises, testified that he received instructions from both Walter and Sanders when keeping accounts and preparing tax returns for a number of corporations, including TWA and Gulf Coast News. William Boshell, who succeeded Golden as accountant, testified that Walter and Sanders both supplied him with the business records of the various corporations. He said that Walter, Sanders and all the corporations had their offices at TWA and added that he was paid with a TWA check for services rendered to the other businesses.

John Catoe, an employee of Walter and Sanders, related at trial that both men told him in 1973 that they were planning a new corporation to distribute sexually explicit materials and that Sanders later stated that this corporation was TWA. According to Catoe, he and all other TWA employees received work instructions from both Walter and Sanders. Catoe also said that when the two men sent him to Florida to manage a new bookstore in June 1975, they explained that Gulf Coast News had been established to supply their Florida operations. In addition, Catoe stated that Walter gave him expense money and ordered him to follow the directions of Richard Larson, the manager of Gulf Coast News, whom Catoe had met at TWA when Larson was being trained. Ronald Bowman, the Gulf Coast News employee who delivered the "David's Boys" films to Greyhound's St. Petersburg terminal, testified that on one visit to the Gulf Coast News warehouse

Sanders was introduced as the man "[y]ou will be working for" and that on another occasion Walter was introduced as Sanders' partner. Bowman also recalled that Richard Larson described the two as partners and identified as theirs the desks in the back of the warehouse. Finally, Carol Maxey, Sanders' former girl friend, testified that Sanders told her that he and Walter jointly owned a number of businesses, including Gulf Coast News.

Given the foregoing testimony describing Walter's central role in the management of TWA, Gulf Coast News and other companies involved in the distribution and sale of hardcore pornography, we do not believe that "the jury must necessarily have had a reasonable doubt" that he possessed the requisite scienter, *United States v. Warner*, 5 Cir., 1971, 441 F.2d 821, 825, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). Accordingly, we conclude that there was sufficient evidence to support Walter's conviction.

III. The District Court's Instructions on Contemporary Community Standards

Finally, appellants challenge the district court's jury instructions regarding the community standards element of the definition of obscenity. They contend that *Pinkus v. United States*, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978) and our subsequent decision in *United States v. Bush*, *supra*, required the trial judge expressly to charge the jury not to consider children in determining the contemporary standards of "the average person of the community as a whole." We reject appellants' expansive reading of *Pinkus* and *Bush* and find no error in the district court's instructions.

In *Pinkus*, the trial judge had charged the jury that, in ascertaining community standards, "you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men, women and children, from all walks of life." *Pinkus v. United States*, *supra*, 436 U.S. at 296, 98 S.Ct. at 1811 (emphasis added). The Supreme Court elected "to take this occasion to make clear that children are not to be included for these purposes as part of the 'community' as that term relates" to the definition of obscenity and therefore held that "it was error to instruct the jury that . . . [children] were a part of the relevant community." *Id.* at 1812. Similarly, in *Bush* the district court had told the jury that "you are to consider the community as a whole, *young and old*, educated and uneducated, religious and the irreligious." (emphasis added). In holding that this charge constituted reversible error, we reasoned that inclusion of "[t]he phrase 'young and old' . . . provides a jury ample freedom to consider children, and thus does not completely avoid the danger, emphasized in *Pinkus*, that 'the adult population [will be reduced] to reading only what is fit for children.'" (citation omitted) 582 F.2d at 1021-22.

Here, however, unlike the instructions in *Pinkus* and *Bush*, the trial judge's charge did not prescribe jury consideration of "children" or "young people" in determining community standards. The district court told the jurors to judge the obscenity of the films by whether their "predominant appeal . . . viewed in [their] entirety, is to the prurient interest of *the average person of the community as a whole*, or the prurient interest of a deviant sexual group, as the case might be, and is so patently offensive that it is utterly without re-

deeming social value." (emphasis added). The judge further explained that "[w]hether the predominant theme or purpose of the material is an appeal to the prurient interest of the 'average person of the community as a whole' is a judgment which must be made in light of contemporary standards as would be applied by the average person with an *average and normal attitude toward, and an average interest in, sex*." (emphasis added) This instruction adequately directed jury consideration to the contemporary standards of adults and thereby avoided the danger emphasized in *Pinkus* and *Bush*.

We have carefully examined appellants' remaining assertions¹⁰ and conclude that they are meritless. Accordingly, we affirm the judgments of conviction as to all appellants.

AFFIRMED.

¹⁰Appellants also contend, individually or in unison, that by accepting and holding the whole shipment of films the Government engaged in prior restraint in violation of the first amendment, that the trial judge should have granted a change in venue, that he erred in refusing to admit comparison evidence and that the district court should have compelled the prosecution to present expert witnesses. In addition, they assert numerous errors in the trial judge's other rulings on pretrial and trial motions and in his instructions to the jury and argue that the voir dire conducted by the court was insufficient. Finally, Walter urges that the prosecution was guilty of prejudicial misconduct, that juror misconduct also prejudiced appellants, that the district court erred in denying his motion for severance and that the films were not obscene.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent. Today the Court holds that the government may take possession of 12 cartons containing 871 films, view the films two months later, retain them for yet another two months—without obtaining a warrant at any point—if the films are the fruit of a private search. The majority reaches the conclusion that the FBI's acquisition of the films in this case falls short of a "seizure" without considering the first amendment interest at stake when expressive matter is taken out of circulation by the government. "The Fourth Amendment * * * must not be read in a vacuum". *Roaden v. Kentucky*, 1973, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757. In my view, the approach of the Eighth Circuit Court of Appeals in *United States v. Kelly*, 1976, 529 F.2d 1365, represents the proper accommodation of the first and fourth amendments. I would reverse the defendants' convictions on the ground that the films were seized in violation of the fourth amendment and, therefore, were illegally admitted into evidence.

I.

The majority presents the facts accurately but not completely. A longer look at the events that occurred once the employees of L'Eggs Products, Inc. notified the FBI of the receipt of the shipment of films leads me to the conclusion that the defendants retained a constitutionally protectible interest in the films that was impermissibly intruded upon by the government.

On September 26, 1977, Michael Horton, area manager for L'Eggs, pried upon one of twelve packages, which were so unusually securely wrapped and reinforced that they did not look "normal" to him. He

discovered that the carton contained films boxes with various sexual scenarios described on the covers. Horton passed on this information to his branch manager, William Fox. Fox then went to the Greyhound terminus, informed the Greyhound employee in charge that the boxes did not belong to L'Eggs, but took them with him anyway, without, however, paying the collect charges. Later, Fox informed FBI agent Mandyk of the incident. Mandyk told Fox to put the cartons aside until he arrived. He also asked the L'Eggs employees to obtain the name of anyone who called to inquire about the packages.

Meanwhile, the defendants made several attempts to find their shipment. One of the defendants called Greyhound to report that the packages were missing. He put a tracer on the shipment, leaving his name and telephone number with Greyhound. During the next few days several of the defendants visited the Greyhound station. Although the assistant terminal manager knew that the packages had been taken to the L'Eggs office, on the instructions of the FBI, he did not provide the defendants with this information. Instead, he told the FBI about the inquirers. The defendants also called the L'Eggs office. They, too, denied that they had the shipment.

Five days after Fox called the FBI, two agents arrived at the L'Eggs office and took possession of the packages and their entire contents. Two months later Agent Mandyk screened each of the 871 films on an office projector. There were twenty-five title films; the remaining 846 films were copies. Another two months elapsed before the FBI turned the films over to the United States Attorney's office. Over a year

later the indictments were returned. Of the twenty-five title films, the government charged that five were obscene.

II.

The major teaching of the Supreme Court's decisions in the obscenity area is that some form of judicial procedure "designed to focus searchingly on the question of obscenity" must precede governmental interference with material arguably within the protection of the first amendment. See *Heller v. New York*, 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745; *A Quantity of Books v. Kansas*, 1964, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809. Because the FBI did not apply to a magistrate for a warrant at any point, the only judicial determination of obscenity was made at the trial on October 21, 1977—over two years after the 871 films were taken out of circulation by the government. Yet, the majority relegates to a footnote the defendants' contention that there was an illegal prior restraint. See note 10 of the majority opinion.

I must assume from the majority's dismissal, without discussion, of the issue of prior restraint that it agrees with the government that there is no first amendment interest at stake in this case. Before this Court, the government argued that the films were not entitled to the protection of the first amendment because they were furtively distributed. When taken, the films were neither being sold nor exhibited to the general public; hence, the government reasons, the public's first amendment right of access to nonobscene matter was not infringed. To support its contention that films enjoy no special constitutional status unless they are available to the general public, the government relies on language in a decision of the Second Circuit Court of Appeals.

"This was strictly an underground operation in hard core pornography with clandestine storage facilities not intended to be available to the public The 'setting' then is hardly such as to presumptively invoke first amendment protection." *United States v. Cangiano*, 2 Cir. 1974, 491 F.2d 906, 913, cert. denied, 419 U.S. 904, 95 S.Ct. 188, 42 L.Ed.2d 149.

It is, of course, true that the procedural safeguards required by the first amendment vary with "the nature of the materials seized and the setting in which they are taken". *Roaden v. Kentucky*, 1973, 413 U.S. 496, 503, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757. A prior adversary hearing must be held before a large quantity of expressive material is seized by the government for the purpose of destruction. See *A Quantity of Books v. Kansas*, 1964, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; *Marcus v. Search Warrant of Property*, 1961, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *Lee Art Theatre v. Virginia*, 1968, 392 U.S. 636, 88 S.Ct. 2103, 2104, 20 L.Ed.2d 1313 (per curiam). "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." *Heller v. New York*, 1973, 413 U.S. 483, 492, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745. Such a seizure is permissible if a neutral magistrate issuing the warrant determines that there is probable cause to believe that the film is obscene and an adversary hearing is available promptly after the seizure.

When films are not subject to absolute suppression, in the sense of destruction, and the public interest in free circulation of the films is attenuated, less strin-

gent procedural limitations on governmental action may be justified. This does not mean, however, that films furtively distributed to a small cadre of customers lose all constitutional protection and may be treated by the government as if they were contraband or ordinary instruments of a crime. The protection of the first amendment cannot turn solely on the size of the audience that expressive matter will reach. History teaches that the first amendment is concerned not only with the public's right of access but also with the right of unpopular and small minorities to express their views. Nor should first amendment protection hinge on the method of dissemination, for unpopular minority views are most likely to be disseminated in a furtive and clandestine fashion. See *United States v. Alexander*, 8 Cir. 1970, 428 F.2d 1169, 1175; Note, *The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films*, 69 Mich.L.Rev. 913, 926-40 (1971).

Indeed, the question before the Second Circuit Court of Appeals in *Cangiano* was not whether the films were presumptively under the protection of the first amendment. The FBI obtained a warrant before seizing the material and an adversary hearing was available upon request by the defendant. The Court merely held that the "setting" was not such as to invoke the requirements of a prior adversary hearing before seizure. I do not know any cases, certainly not in this Circuit, holding that the taking of furtively distributed films raises no first amendment concerns at all. Such a proposition would be startling in light of the Supreme Court's decision in *Heller v. New York*, 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745. There, a single copy of a film was seized. Because other copies were available

for screening to the public, there was no restriction on the public's right of access. Yet, the Court held that the copy could be seized as evidence only if the government observed strict procedural safeguards.¹ "The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be considered in light of First Amendment guarantees". 413 U.S. at 493, 93 S.Ct. at 2795.

I have elaborated on decisions in the area of obscenity and prior restraints to demonstrate that the defendants had a legitimate first amendment interest in the films at the time they were taken by the FBI. I do not decide whether the restraint imposed in this case was so extensive that an adversary hearing should have been held before the films were taken. It is unnecessary to decide that question because the government did not observe the minimum procedural safeguards demanded by the Supreme Court in *Heller*. I point out, however, that unlike *Heller* the amount of material taken by the FBI in this case must be termed "massive". The retention of 846 copies far exceeds the requirements of officers seeking to pursue criminal charges. Moreover, we do not know whether the films were

¹The first articulation of the view that furtively distributed films are entitled to no first amendment protection was in a district court opinion, *United States v. Pryba*, D.D.C. 1970, 312 F.Supp. 466. There, too, a warrant was obtained before seizure of the films. The decision of the district court was upheld by the District of Columbia Court of Appeals on the alternative theory that the requirements of *Heller* were satisfied. *United States v. Pryba*, 1974, 163 U.S.App.D.C. 389, 412-13, 502 F.2d 391, 404-05.

earmarked for storage in a warehouse or whether they were on the threshold of dissemination. One cannot assume, therefore, that the FBI's actions did not block the orderly distribution of the films. And in that circumstance, the Supreme Court has implied that the requirements of *A Quantity of Books* must be met. *Heller v. New York*, 1973, 413 U.S. at 492, 93 S.Ct. 2789.

III.

Given the special constitutional character of the items taken by the FBI, I see two mutually supporting reasons that compel application of the exclusionary remedy in this case.

In the first place, the first amendment is an independent source of restrictions upon the power of the police to take expressive material. For example, because of first amendment concerns, a film cannot be seized as an incident to a lawful arrest. *Roaden v. Kentucky*, 1973, 413 U.S. 497, 93 S.Ct. 2796. This is true even though the fourth amendment is generally understood to permit the seizure of items during a lawful arrest. *Chimel v. California*, 1969, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. As the Court explained in *Roaden*, the seizure of a copy of a film "by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint" . . . 413 U.S. at 504, 93 S.Ct. at 2801. "The seizure proceeded solely on the police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. at 506, 93 S.Ct. at 2802. Thus, to supply the necessary judicial determination of obscenity, the

Supreme Court harnessed the fourth amendment procedural guarantee of a neutral magistrate.²

Functionally, the government's acceptance of the films in this case resembles a "seizure" resulting in a prior restraint. It is a nonjudicially imposed suppression of expressive matter. Like a seizure "proceed[ing] solely on the police officer's conclusion", the acceptance and retention of the films wholly frustrated the exercise of first amendment rights without any searching inquiry by a magistrate into the merits of the first amendment claim. It is imperative, therefore, to view the acquisition of these films by the FBI as a "seizure" subject to the procedural guarantees of the fourth amendment.³

²The Supreme Court has also held that the first amendment imposes its own, more stringent, limitations on obtaining and executing a search warrant. A judicial warrant for the seizure of a film may not be issued "solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions." *Lee Art Theatre, Inc. v. Virginia*, 1968, 392 U.S. 636, 637, 88 S.Ct. 2103, 2104, 20 L.Ed.2d 1313 (per curiam); *Marcus v. Search Warrant of Property*, 1961, 367 U.S. 717, 731-32, 81 S.Ct. 1708, 6 L.Ed.2d 1127. Furthermore, where books are seized, a heightened degree of specificity in a search warrant's description of "things to be seized" is required. *Stanford v. Texas*, 1965, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431. "But where the special problems associated with the First Amendment are not involved . . . is a more 'reasonable particularity' . . . is permissible". *Berger v. New York*, 1967, 388 U.S. 41, 98, 87 S.Ct. 1873, 1904, 18 L.Ed.2d 1040. (Harlan, J., dissenting).

³Professor Monahan suggests a similar analysis with respect to warrantless arrests. Viewing the first amendment as a source of restrictions upon the power of the police to seize persons as well as things, he argues that the police should be prohibited from arresting those committing offenses in their presence when the offenders are exhibitors or distributors of arguably first amendment protected matter. "Functionally, an arrest resembles a nonjudicially imposed injunction against certain conduct; . . . here, there is not even the barest judicial inquiry before the damage is done." Monahan, First Amendment "Due Process", 83 Harv.L.Rev. 518, 538 (1970).

The suppression of the films as evidence is also justified under traditional fourth amendment doctrine.

I start from the premise that the defendants had a constitutionally protectible privacy interest in the packages before they were discovered by the employees of L'Eggs. The district court held that shipping material by means of a common carrier to a fictitious consignee amounted to a relinquishment or abandonment of any reasonable expectation of privacy. The majority agrees with this conclusion. *See* slip opinion page 3892, page of the majority opinion. The increased likelihood that the parcel would be misdelivered cannot be equated with an abandonment of all reasonable expectations of privacy. Misdelivered packages are usually returned; indeed, they are usually returned unopened. The careful manner in which the films were wrapped in individually sealed containers as well as the use of a fictitious cover name for the addressee demonstrates, instead, a strong desire to maintain the defendants' interest in privacy, to avoid the contents getting into the wrong hands, and to continue ownership of the films or a possessory interest in the films until their delivery into the right hands.

The initial search of these films was by private parties and was, therefore, outside the scope of the fourth amendment. *Burdeau v. McDowell*, 1921, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048. A search, however, is merely the first step in an invasion of privacy that ends with the introduction in court of incriminating evidence. When the initial search is conducted by private parties, the question remains whether governmental conduct after that point amounts to an independent invasion of the right of privacy controlled by the standards of the fourth amendment. *See generally*

Note, *Private Searches and Seizures*, 90 Harv.L.Rev. 463 (1976).

The majority also does not hold that fourth amendment issues were automatically exhausted once the initial private search was completed. The Court scrutinizes separately whether the government's viewing of the films discovered in the private search was an additional "different" search, concluding that when the FBI agent screened films, the obscene content of which had already been ascertained by the employees of L'Eggs, he "did not 'change the nature of the search' ". The majority refuses, however, to test the government's acquisition of the films against the same standard. Without examining the nature of the FBI's actions in taking and retaining the fruits of the private search, the Court holds that it was not a "seizure"; it was no more than a passive acceptance of an accomplished fact.

The government's acquisition of the fruits of the private search must be termed a "seizure" because it interfered with the defendants' interest in the films in a new and different way. "It constituted a deprivation of the defendants' property interests". *See Note, Private Searches and Seizures, supra* at 469. The defendants had a legitimate possessory interest in the films acquired by the FBI until a judge, jury, or neutral magistrate issuing a warrant, established probable obscenity. They had, therefore, a reasonable expectation of freedom from governmental interference with these films. "Legitimation of expectations of privacy by law must have

⁴Although I believe that the FBI's examination of the films at the L'Eggs' office was not an independent "search" subject to the fourth amendment, I cannot agree with the majority's conclusion that the later screening of the films at the office of the FBI was merely a continuation of the private search. *See* text slip opinion pp. 3906-3907, pp.-..... *infra*.

a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, book II, Ch. I, and one who owns or lawfully possesses . . . property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas v. Illinois*, 1978, U.S., 99 S.Ct. 421, 58 L.Ed.2d 387, 401, n. 12. This expectation is protected by the fourth amendment.

It is true that when the employees of L'Eggs took the packages from the common carrier and opened them, the defendants' ordinary privacy interest in the packages, in the sense of their desire to insulate the contents of the packages from the eyes of others, was infringed. That interest was not affected in any new way by the FBI's observance of the contents of the packages at the L'Eggs office.⁵ But the defendants' retained a possessory interest in the films themselves, because they had a reasonable expectation that the packages would be retrieved after misdelivery or returned by the private parties to the common carrier. They also had a reasonable expectation that the films would be returned to them by the government pending a judicial determination of obscenity. Thus, they had a right to exclude the government from taking posses-

⁵See note 4 *supra*.

sion of the films. When the FBI appropriated the films, it abruptly and completely interfered with these legitimate expectations. The appropriation of the films was, therefore, a "seizure".

The majority contends, nevertheless, that the Eighth Circuit's characterization, in *Kelly*, of the government's acceptance of the films as a "seizure" contradicts a long line of decisions by the Supreme Court and this Circuit. None of the cases cited by the majority, except *Sherwin v. United States*, 9 Cor. 1976, 539 F.2d 1, addresses the taking of material presumptively protected by the first amendment. And it is worth noting that, in *Sherwin*, the FBI immediately obtained a warrant to seize a shipment of books after it accepted two copies of printed material discovered in the private search. Furthermore, none of the cases cited by the majority undertakes a separate fourth amendment analysis of the government's acquisition of the items discovered in the private search.

Over fifty years ago the Supreme Court held in *Burdeau v. McDowell*, *supra*, over a dissent by Justices Brandeis and Holmes, that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure. Commentators have cast doubt on the continued vitality of the *Burdeau* rule in its broadest sense. It permits the government to accomplish circuitously what it could not accomplish directly. In other words, it is the twin of the "silver platter" doctrine

that allowed federal prosecutors to use illegal evidence independently obtained by state and local officers. See generally, Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, II, 52 Tex.L.Rev. 621, 661 (1974). Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 Va.L.Rev. 1314, 1336-59 (1969). The "silver platter" doctrine was abandoned nearly thirty years after *Burdeau* was decided. *Elkins v. United States*, 1960, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669. Moreover, when *Burdeau* was decided, there were few justifications for warrantless seizures. "The failure of *Burdeau* to subject the government's acceptance of privately discovered objects to fourth amendment analysis gave the police a desirable freedom of action. Under current fourth amendment doctrine, the exceptions to the warrant requirement . . . permit the police to take immediate action where their protective and law enforcement duties most demand it." Note, *Private Searches and Seizures*, *supra*, at 469.

The Fifth Circuit cases cited by the majority are primarily concerned with whether there was a "separate or additional search" by the government. See *United States v. Blanton*, 5 Cir. 1973, 479 F.2d 327, 328 (emphasis added); *United States v. Lamar*, 5 Cir. 1977, 545 F.2d 488. The majority argues, however, that the introduction into evidence of the fruits of the private search would have been impossible in each of these cases unless the government's acceptance of the articles turned over by the private parties was implicitly immunized from the fourth amendment. Yet in each of the cases the actual seizure of the items can be justified under traditional exceptions for warrantless seizures. For example, in *Lamar*, an airport official

discovered heroin in a bag left by a passenger at the airport. He showed the contents of the bag to the police. When the passenger reclaimed the bag later that night, he was arrested. The bag could have been taken into possession by the police as an incident to a lawful arrest.⁶

In this case, the warrantless seizure cannot be justified under existing exceptions to the warrant clause. The employees of L'Eggs had no authority to consent to the government's appropriation of the presumptively lawful contents of the package. The seizure cannot be justified under the plain view doctrine. See *United States v. Kelly*, 8 Cir. 1976, 529 F.2d at 1372-73. There were no exigent circumstances necessitating immediate action. The FBI had ample opportunity to secure a warrant on the basis of an affidavit by either the FBI agents or the employees of L'Eggs. The seizure was, therefore, unreasonable.

IV.

When evidence is seized in violation of the fourth amendment, the constitutional remedy is the suppression of the illegally obtained evidence. The exclusion of the films as evidence, rather than the return of the films to the owners, is the proper remedy in this

⁶The FBI's acceptance of a bag containing a silencer, discovered in a private search at the airport, in *United States v. Blanton*, 5 Cir. 1973, 479 F.2d 327, was also "reasonable" because it was incident to a lawful arrest and because exigent circumstances justified the warrantless seizure. 479 F.2d at 328. Thus, other circuits have scrutinized the reasonableness of governmental takings of objects in a private search directly under the fourth amendment. See, e.g., *United States v. Ogden*, 9 Cir. 1973, 485 F.2d 536, 540; *United States v. Tripp*, 9 Cir. 1972, 468 F.2d 569, 570, cert. denied, 1973, 410 U.S. 910, 93 S.Ct. 965, 35 L.Ed.2d 272.

case. This is true even though the source for characterizing government action as a seizure is primarily the first amendment⁷ and even though the principal interest infringed in this case is a possessory one.⁸ When

⁷Many courts, including a panel of this Circuit, have held that "[w]hen materials are seized in violation of the first amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial". *United States v. Bush*, 5 Cir. 1978, 582 F.2d 1016, 1021. See also *United States v. Sherwin*, 9 Cir. 1976, 539 F.2d 1, 8 n. 11; *United States v. Cangiano*, 2 Cir. 1972, 464 F.2d 320, 328, vacated on other grounds, 1973, 413 U.S. 913, 93 S.Ct. 3047, 37 L.Ed.2d 1023, on remand, 2 Cir., 491 F.2d 905, cert. denied, 1974, 418 U.S. 934, 94 S.Ct. 3223, 41 L.Ed.2d 1171; *Tyrone, Inc. v. Wilkinson*, 4 Cir. 1969, 410 F.2d 639, 641; *Metzger v. Percy*, 7 Cir. 1968, 393 F.2d 202, 204. These cases are concerned with the seizure of expressive matter pursuant to a warrant but without a prior adversary hearing. The courts have reasoned that the exclusionary rule does not apply where a seizure is defective for lack of an adversary hearing because "the primary right involved is the public's First Amendment right of access, rather than the defendant's Fourth Amendment immunity from unreasonable search and seizure". *Huffman v. United States*, 1972, 152 U.S.App.D.C. 238, 244, 470 F.2d 386, 392.

At least one court has recognized, however, that the Supreme Court's decisions in *Heller* and *Roaden* may obliterate any distinction between violations of the first and fourth amendments when a seizure of expressive matter is defective for lack of a determination of probable obscenity by a neutral magistrate. See *United States v. Pryba*, 1974, 163 U.S.App.D.C. 389, 402, 502 F.2d 391, 404 n. 97.

⁸In *Sherwin*, the Ninth Circuit Court of Appeals suggested that "when objects found in a private search are turned over to the government, then, only the property interests of the owner are implicated. A motion for return of the objects is a proper means of asserting these interests". 539 F.2d at 8, n. 10. Because "the principal object of the Fourth Amendment is the protection of privacy rather than property . . ." *Warden v. Hayden*, 1967, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782, . . . "[e]ven when there is a governmental seizure, suppression as evidence may not be the proper remedy if only property rights are affected and there has been no governmental invasion of privacy." 539 F.2d at 8, n. 10.

The *Sherwin* court's preference for the remedy of return of the objects rather than their exclusion from evidence at

the government obtains films discovered in a private search and retains them, without the knowledge of the owner, for a considerable period of time, the remedy of return comes too late. The owners did not know where the films were. Indeed, the government took pains to ensure that the defendants would not be able to locate the films. The defendants could not ask the government to return the films until they were informed that the government had taken possession of their packages. This information was conveyed, at the earliest, more than a year after the films were acquired by the FBI.⁹ Moreover, the Supreme Court has implicitly recognized, in *Roaden*, that the exclusionary rule is the most effective deterrent to unlawful government action affecting freedom of expression. Observing that the "use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . ." 413 U.S. at 506, 93 S.Ct. at 2802, citing *Marcus v. Search Warrant of Property*, 1961, 367 U.S. 717, 729, 81 S.Ct. 1708, 6 L.Ed.2d 1127, the Court reversed a conviction based on the admission

trial is based on a mistaken view that possessory interests have no role in delineating reasonable expectations of privacy. On the contrary, recent Supreme Court decisions have emphasized that there is no abstract concept of privacy and that the concept of legitimate property interests can define more concretely the scope of the fourth amendment. See, e.g. *Rakas v. Illinois*, 1978, . . . U.S. . . ., 99 S.Ct. 421, 58 L.Ed.2d 387, quoted in text, slip opinion p. 3903, p. . . ., *supra*.

⁹Return of the objects may have been an appropriate remedy in the circumstances of *Sherwin*. In that case, the owners were immediately informed that the government had taken possession of two copies of obscene material. Moreover, when the FBI applied for a warrant the following day, to seize the remainder of the shipment, the magistrate ordered that notice be given to the defendants.

into evidence of films seized incident to a lawful arrest. Therefore, I would reverse the convictions of the defendants in this case.

V.

I would also reverse the convictions of the defendants on the ground that the FBI conducted an independent search, prohibited by the fourth amendment, after acquiring the films.

Relying on language in *United States v. Haes*, 8 Cir. 1977, 551 F.2d 767, the majority holds that the screening of the films on a projector at the office of the FBI was not a separate, independent search because the L'Eggs employees, unlike the private searches in *Haes*, had already ascertained the nature of the films from the box covers and were able to make "a determination of possible obscenity prior to turning the films over to the FBI." 551 F.2d at 772. The "sense impressions or legal conclusions" of the employees of L'Eggs have no place in determining whether the FBI agents conducted a new or different search. See *United States v. Haes*, 551 F.2d at 773 (Webster, J., dissenting). The question whether the films were obscene bears only on the issue of probable cause to search and seize the films; and that determination must be made by a neutral magistrate issuing a warrant.

Nor can I agree with the majority that the FBI's viewing of the films on a screen was merely a continuation of the private parties' observation of the box covers because, as it turned out, the covers accurately reflected their contents. The two-month hiatus between the private search and the governmental screening negates any assumption that one continuous search took

place. Cf. *Coolidge v. New Hampshire*, 1971, 403 U.S. 443, 458, 464, 91 S.Ct. 2022, 29 L.Ed.2d 564. Each of the cases cited by the majority deal, instead, with governmental viewing of material immediately after being called to the scene of the private search by the private parties. See *United States v. McDaniel*, 5 Cir. 1978, 574 F.2d 1224; *United States v. Blanton*, 5 Cir. 1973, 479 F.2d 327; *United States v. Pryba*, 1974, 163 U.S.App.D.C. 389, 399, 502 F.2d 391, 401; *United States v. Ford*, 10 Cir. 1975, 525 F.2d 1308, 1312. Second, as in *Haes*, the FBI's actions in viewing the films two months later must be characterized as "initiating and carrying out their own inspection of the films for their own purposes." 551 F.2d at 771. If the descriptions on the box covers are an infallible guide to the contents of the films there would have been no need to retain the films for two months before making them available to the United States Attorney's office.

Contrary to the majority, I see no basis for distinguishing the Supreme Court's decision in *United States v. Chadwick*, 1977, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, from the instant case. See note 7 of the majority opinion. In *Chadwick*, the Supreme Court held that the FBI could not search the contents of a footlocker after it took exclusive custody of the item without obtaining a warrant. Before the FBI took exclusive possession of the items in this case, the L'Eggs employees had viewed the film boxes but had not opened the boxes or viewed their contents. True, there was probable cause to believe that the boxes contained obscene films. But in *Chadwick*, too, there was probable cause to believe that the footlocker contained contraband—and the search validated this assumption. In

this case, therefore, as in *Chadwick*, a judicial warrant must be obtained before the containers can be searched.

VI.

The *Burdeau* rule has spawned much critical literature.¹⁰ Today, the Court extends that rule into an area where the constitutional requirements of the fourth amendment are to be "accorded the most scrupulous exactitude". *Stanford v. Texas*, 1965, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431. Placing the government's acceptance of expressive materials outside the scope of the fourth amendment, by "cast[ing] the government in the role of a passive receiver . . . absolve[s] the government of any first amendment responsibilities or restrictions . . . [It] allows for the possibility of government-sanctioned private censorship without judicial supervision." Note, *Private Searches and Seizures*, *supra* at 467. In short, the majority rule frustrates the Supreme Court's efforts to utilize the fourth amendment as a source of procedural guarantees aimed at controlling governmental action that affects freedom of expression. The approach of the Eighth Circuit Court of Appeals in *Kelly*, which subjects the government's taking of expressive materials discovered in a private search to the scrutiny of the fourth amendment, properly guards both the first amendment rights and the privacy interests of absent third parties.

Therefore, I respectfully dissent.

¹⁰See, e.g., Black, *Burdeau v. McDowell—A Judicial Milepost on the Road to Absolution*, 12 B.U.L.Rev. 32 (1932); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 Stan.L.Rev. 608 (1967); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 Va.L.Rev. 1314, 1336-59 (1969).

APPENDIX B.

Opinion and Order of the Court of Appeals.

United States Court of Appeals, Fifth Circuit.

United States of America, Plaintiff-Appellee, v. Arthur Randall Sanders, Jr., Gulf Coast News Agency, Inc., Trans World America, Inc. a/k/a TWA, Inc. and William Walter, Defendants-Appellants. No. 77-5715.

June 15, 1979.

In a prosecution of defendants for conspiracy, knowing use of a common carrier to ship obscene materials into state, and knowing use of a common carrier to transport obscene material interstate for purposes of sale or distribution, defendants were convicted in the United States District Court for the Middle District of Florida, W. Terrell Hodges, J., and the convictions were affirmed on appeal, 592 F.2d 788. On petition for rehearing and rehearing en banc, the Court of Appeals held that the proper remedy for the Government's engaging in prior restraint in violation of the First Amendment is return of the property in question, not its suppression as evidence at trial.

Petitions for rehearing and rehearing en banc denied.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITIONS FOR REHEARING
AND PETITIONS FOR REHEARING
EN BANC

(Opinion April 2, 1979, 5 Cir., 1979,
592 F.2d 788)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 16), the Petitions for Rehearing En Banc are also DENIED.

Appellants contend that the Government in this case engaged in prior restraint in violation of the First Amendment. However, the majority of the panel (Judges Ainsworth and Clark) point out that this Court held in *United States v. Bush*, 5 Cir., 1979, 582 F.2d 1016, 1021 (Morgan, J.) that the appropriate remedy for such a violation is "return of the . . . property, . . . not its suppression as evidence at trial." See also *United States v. Echols*, 5 Cir., 1978, 577 F.2d 308.

Thus, even had the Government "abridge[d] the public's First Amendment right to access to" expressive matter in this case, the proper remedy would be "return of the allegedly obscene materials" to the owner, with the Government retaining sample films for evidentiary purposes, "not suppression of these items at a subsequent obscenity trial." *United States v. Cangiano*, 2 Cir., 1972, 464 F.2d 320, 328, *vacated on other grounds*, 413 U.S. 913, 93 S.Ct. 3047, 37 L.Ed.2d 1023, *on remand*, 491 F.2d 905, *cert. denied*, 418 U.S. 934, 94 S.Ct. 3223, 41 L.Ed.2d 1171 (1974); *Huffman v. United States*, 1971, 152 U.S.App.D.C. 238, 244, 470 F.2d 386, 392. See *United States v. Womack*, 1974, 166 U.S.App.D.C. 35, 49-50 n.48, 509 F.2d 368, 382-83 n.48; *United States v. Sherwin*,

9 Cir., 1976, 539 F.2d 1, 8 n.11 (en banc). Cf. *United States v. Alexander*, 8 Cir., 1970, 428 F.2d 1169, 1176; *Tyrone, Inc. v. Wilkinson*, 4 Cir., 1969, 410 F.2d 639, 641; *Metzger v. Percy*, 7 Cir., 1968, 393 F.2d 202, 204.

We have found no decision that has deviated from the foregoing authority and that has applied the exclusionary rule under circumstances similar to those here. There was no First or Fourth Amendment violation in this case, and therefore exclusion of the sexually explicit films from evidence in this case would have been erroneous.

APPENDIX C.

Order.

In the United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Arthur Randall Sanders, Jr., Gulf Coast News Agency, Inc., Trans World America, Inc., a/k/a TWA, Inc. and William Walter, Defendants-Appellants. No. 77-5715.

Appeals from the United States District Court for the Middle District of Florida.

The motions of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including JULY 15, 1979, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Robert A. Ainsworth

UNITED STATES CIRCUIT JUDGE

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

2. The provisions of the Fourth Amendment are:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law . . ."

4. The provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

5. 18 U.S.C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

6. 18 U.S.C. §371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

7. 18 U.S.C. §1462 provides in pertinent part:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

* * *

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

8. 18 U.S.C. §1465 provides:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

9. Rule 14, Federal Rules of Criminal Procedure provides as follows:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

APPENDIX E.

October 23, 1975

Mr. William Boshell
Suite 1435
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Dear Mr. Boshell:

Below are the names of corporations and the sole stockholders:

Fun & Games Corp., 100% stock, Carol Maxey

B.A.S.T., 100% stock, Ronald Atkins

T.W.A., 100% stock, Mike Grassi

S.S.W. Corp., 100% stock, Arthur Sanders

Bayou Landing Lmt'd., Inc., 100% stock, Lewis C.
Bordeaux

Gulf Coast Corp., 100% stock, Wayne Schergen

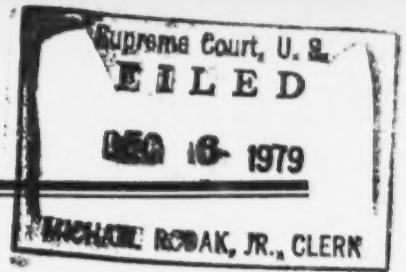
Yours very truly,

/s/ Glenn Zell

Glenn Zell

GZ/jh

APPENDIX



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NO. 79-67

WILLIAM WALTER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

NO. 79-148

ARTHUR RANDALL SANDERS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JULY 16, 1979
CERTIORARI GRANTED OCTOBER 15, 1979

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SUMMARY OF RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Description of Document or Proceeding</u>	<u>Doc. No.</u>
4/6/77	Indictment returned (11 counts.	1
5/31	Defendant Sanders thru his trial counsel adopts all other motions filed by counsel for William Walter.	11
5/31	Consolidated motion to dismiss (Sanders).	14
5/31	Memorandum of points and authorities in support of consolidated motion to dismiss (Sanders)	15
5/31	Memorandum in support of motion to suppress evidence and return property illegally seized (Sanders)	16
5/31	Motion to suppress evidence and return property illegally seized (Sanders).	17
6/3	Motion for the return of seized property and the suppression of evidence; memorandum of points and authorities in support thereof (Walters.	18
6/3	Motion to compel election as to whether alleged appeal to prurient interest of questioned material is to average adult or to member of clearly defined deviant sexual group; memorandum of points and authorities in support thereof Walter).	19

<u>Date</u>	<u>Description of Document or Proceeding</u>	<u>Doc. No.</u>
6/3	Notice of motion and motion for severance; points and authorities and affidavits in support thereof. (Walter)	20
6/3	Motion to dismiss the indictment; memorandum of points and authorities in support thereof (Walter)	22
6/3	Motion for change of venue, memorandum of points and authorities and affidavit. (Hearing and oral argument requested (Walter)).	24
6/3	Adoption by Defendant Walter of co-defendants' pretrial motions.	26
6/17	Order: Motion to compel election of counts and to dismiss remaining counts - denied. Notice of motion and motion for severance - denied. Motion to strike surplusage - denied. Motion to dismiss based on array of jurors - denied.	27
7/8	Governments opposition to defendants motion for change of venue.	33
7/8	Governments response to defendants consolidated motion to dismiss.	34
7/8	Governments response to defendants motions to suppress and return evidence.	36
7/8	Governments response to defendants motion to dismiss.	37
7/19	Governments response to defendant Walter's motion to compel election regarding standard of appeal to prurient interest.	38

7/19	Motion for continuance, affidavit of W. Michael Mayock in support of continuance (Walter)	39
8/2	Proceedings: Hearing on pending motion. Governments witnesses sworn. Defendant witnesses sworn. Government exhibits 1, 2 and 3 in evidence. Defendants exhibits A and C in evidence. Defendants motion for continuance - denied. Hearing in recess until 9:00 A.M. August 9, 1977.	
8/5	Order; Consolidated motion to dismiss the indictment, filed 5/31/77 is denied. Motion to compel election as to whether alleged appeal to prurient interest of questioned material is to the average adult or to members of clearly defined deviant sexual groups is denied.	42
8/5	Motion to dismiss the indictment, filed 6/3/77 is denied. To the extent the motion seeks dismissal based on former jeopardy it is denied without prejudice to renewal subsequent to trial. The motion for change of venue is denied. The motion to dismiss or in the alternative to recuse the U.S. Atty's office is denied. The motion to transfer the case to the Hon. Ben Krentzman, is denied. The motion for a continuance of trial, made on the record in open court 8/2/77 is reaffirmed and the motion is denied. The court reserves ruling on defendants' motion to suppress and for return of the seized property pending the conclusion of the hearing on 8/9/77 at 9:00 AM.	

- 8/9 Hearing on motion to suppress. Motion for return of property - ruling reserved. Motion to suppress = denied.
- 8/10 Motion in limine to prohibit any reference to or use of defendant's guilty plea to similar obscenity charges; exhibits. 44
- 8/10 Proceedings of trial by jury; Jurors challenged for cause; Jury selected - not sworn. Court recessed until 9:30 A.M. 8/11/77.
- 8/11 Proceedings: Trial by jury resumed from 8/10/77. Jury sworn. (9:30 AM). Rule invoked. Government opening statement. Defendant Walter opening statement. Defendant Sanders, Gulf Coast News Agency, Inc. and Trans World America, Inc. opening statement. Government witnesses sworn. Government exhibits 6, 6A, 8A, 9A, 10A, 11A, 17A, 13 in evidence. Court recess until 9:30 AM, 8/12/77.
- 8/12 Trial by jury resumed from 8/11/77. Government witnesses. Government exhibits 1 thru 5, 7, 15, 17, 17A, in evidence. Defendant exhibits 1 in evidence. Court recessed until 9:30 AM 8/15/77.
- 8/15 Trial by jury resumed from 8/12/77. Juror #47 excused. Juror #159 seated in place. Government witnesses sworn. Showing of exhibits 1 thru 5. Defendant witness sworn. Government exhibits: 13A, 16, 16A, 16B, 18, 19, 20 in evidence. Court in recess until 9:30 AM, 8/16/77.

- 8/16 Trial by jury resumed from 8/15/77. Government witnesses sworn. Government rests. Defendant Walter's motion for judgment of acquittal - denied. Defendants Sanders' motion for judgment of acquittal - denied. Defendant witnesses sworn.
- 8/16 Recessed until 9:30 AM 8/17/77
- 8/17 Trial by jury resumed from 8/16/77. Defendant's witnesses sworn. Defendants rest. Government rebuttal witnesses sworn. Both sides rest. Court in recess until 9:00 AM 8/18/77.
- 8/18 Trial by jury resumed from 8/17/77. Defendants' motion for judgment of acquittal - denied. Charge conference. Government closing argument. Motion for mistrial - denied. Defendant Walter's closing argument. Defendant Sanders' closing argument. Government rebuttal argument. Jury instructions. Jury retired to deliberate. Court in recess until 9:30 AM 8/19/77.
- 8/19/ Trial by jury resumed from 8/18/77. VERDICT AS TO DEFENDANT SANDERS: Guilty as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. 44A
VERDICT AS TO DEFENDANT WALTER: Guilty as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. 44B
VERDICT AS TO GULF COAST NEWS AGENCY: Guilty as to each of 11 counts as charged. 44C
VERDICT AS TO TWA: Guilty as to Count 1. 44D
Jury polled - all agreed. Adjudication deferred as to each defendant. To be sentenced at 9:30 AM 9/30/77.
- 8/19/ Defendants consolidated proposed jury instructions. 45

8/19	Governments proposed instructions.	45A
9/9	Defendants' requested voir dire examination (Walter).	46
9/9	Questions proposed by defendant, Arthur Sanders, to be asked to prospective jurors on voir dire.	47
9/9	Governments voir dire questions.	48
9/19	Court's instructions to the jury.	
9/16	Motion for judgment of acquittal; memorandum of points and authorities in support thereof (Walter).	50
9/16	Motion for new trial; memorandum of points and authorities in support thereof; affidavit of W. Michael Mayock in support thereof (Walter)	51
10/7	Governments opposition to defendant's motion for new trial and judgment of acquittal	53
10/12	Order: Defendants' motion for extension of time in which to file post-trial motions - granted. Defendants motion for a new trial - denied. Defendants motion for judgment of acquittal - denied. Court reserves ruling until sentencing on Grassi's motion to withdraw his guilty plea. Sentencing continued and rescheduled for 10/21/77 at 9:30 AM.	54
10/21	SENTENCE (Walter): Adjudication of guilt made as to Counts 1 thru 11. 3 years as to Ct. 1, 3 yrs. as to Cts. 2 thru 11 concurrent with each other and with sentence imposed in count 1. Sentence imposed pursuant to Title 18, Sec. 4205(b)(2) USC.	

	Defendant advised of right to appeal. Bond continued.	55
10/21	SENTENCE (Sanders); Adjudication of guilt made as to Counts 1 thru 11. 3 yrs. as to Ct. 1, 3 yrs. as to Counts 2 thru 11 concurrent with each other and with sentence in count 1. Sentence imposed herein pursuant to Title 18, USC, Sec. 4205(b)(2). Defendant advised of right to appeal. Bond continued.	56
10/21	SENTENCE (Gulf Coast News Agency, Inc.): Adjudication of guilt made as to Counts 1 thru 11. Fine of \$3,000.00 as to each of Counts 1 thru 11 consecutively. (Total fine \$33,000) Fine stayed pending appeal. Defendant advised of right to appeal.	57
10/21	SENTENCE (Trans World America, Inc.): Adjudication of guilt made as to Count 1. Fine of \$10,000.00, stayed pending appeal. Defendant advised of right to appeal.	58
10/21	Notice of Appeal (Walter)	59
10/26	Notice of Appeal (Sanders)	64
10/26	Notice of Appeal (Gulf Coast News Agency, Inc.).	65
10/26	Notice of Appeal (Trans World America, Inc.)	66

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

V.

WILLIAM WALTER, RICHARD WILLIAM
LARSON, ARTHUR RANDALL SANDERS, JR.,
MICHAEL JOHN GRASS, JR., GULF COAST
NEWS AGENCY, INC., TRANS WORLD
AMERICA, INC., a/k/a TWA, INC.

Case No. 77-49-Cr-T-11

4/6/77

The Grand Jury charges:

COUNT ONE

From on or about April 6, 1973, and continuing up to and including the date of this indictment, in the middle District of Florida, and elsewhere, WILLIAM WALTER, RICHARD WILLIAM LARSON, ARTHUR RANDALL SANDERS, JR., MICHAEL JOHN GRASSI, JR., GULF COAST NEWS AGENCY, INC., and TRANS WORLD AMERICA, INC., a/k/a TWA, INC., defendants herein, unlawfully, wilfully,

and knowingly did combine, conspire, confederate, agree, and have a tacit understanding with each other and with other co-conspirators known, but not named as defendants in this indictment, together with other persons whose names are unknown to the Grand Jury, to:

1.

Knowingly transport and cause to be transported in interstate commerce by common carrier and express companies obscene, lewd, lascivious, and filthy books, pamphlets, pictures, and motion pictures, in violation of Title 18, United States Code, Section 1462.

2.

Knowingly transport in interstate commerce for the purpose of sale and distribution obscene, lewd, lascivious, and filthy books, pamphlets, pictures and films, in violation of Title 18, United States Code, Section 1465.

All in violation of Title 18, United States Code, Section 371.

It was further part of said conspiracy that the defendants, WILLIAM WALTER, RICHARD WILLIAM LARSON, ARTHUR RANDALL SANDERS, JR., MICHAEL JOHN GRASSI, JR., and others, would and did establish, acquire, operate, and control, Gulf Coast News Agency, Inc., TWA, Inc., SSW, Inc., Fun & Games, Inc., and BAST, Inc., for the purpose of selling and distributing certain obscene, lewd, lascivious, and filthy books, pictures, and motion pictures.

In furtherance of the conspiracy and to effect the objects thereof, the defendants did commit the following overt acts:

1. On or about April 6, 1973, ARTHUR RANDALL SANDERS, JR., signed as president, an application for Certificate of Registration with the Florida Department of Revenue for the Kennedy Book Mart, 2928

West Kennedy Boulevard, Tampa, Florida. Said store is owned and operated by SSW, Inc., a Georgia corporation.

2. That on or about May 24, 1974, ARTHUR RANDALL SANDERS, JR., signed as director, an application for Certificate of Registration with the Florida Department of Revenue for the Tamiami Adult Book Store, 4500 South Tamiami Trail, Sarasota, Florida. Said store is owned and operated by TWA, Inc., a Georgia corporation.

3. That on or about May 6, 1974, TWA, Inc. purchased a Lincoln Continental and WILLIAM WALTER signed the sales contract as buyer.

4. On or about June 1, 1975, RICHARD WILLIAM LARSON signed a lease for office and warehouse facilities at 5430 70th Avenue North, Pinellas Park, Florida, on behalf of Gulf Coast News Agency, Inc.

5. On or about July 25, 1975, RICHARD

WILLIAM LARSON signed a county occupational license in Pinellas County, Florida, on behalf of Gulf Coast News Agency, Inc., 5430 70th Avenue North, Pinellas Park, Florida.

6. On or about July 8, 1975, ARTHUR RANDALL SANDERS, JR., visited the Gulf Coast News Agency warehouse in Pinellas Park, Florida.

7. On or about September 25, 1975, Gulf Coast News Agency, Inc., using alias of D and L Distributors, shipped via Greyhound Package Express, twelve cartons of film to TWA, Inc., using alias of Leggs, Inc.

8. On or about October 15, 1975, MICHAEL JOHN GRASSI, JR., telephoned L'Eggs, Inc., 3176 Marian Drive, Chamblee, Georgia, stating that twelve packages consigned to his company had been mistakenly picked up by L'Eggs, Inc., in the Greyhound Bus Terminal.

9. On or about November 23, 1975, WILLIAM WALTER visited the Gulf Coast News

Agency warehouse in Pinellas Park, Florida.

COUNT TWO

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR., aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 13, "Look At The Birdie", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT THREE

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM

LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 13, "Look At The Birdie", in violation of Title 18, United States Code, Sections 1462, and 2.

COUNT FOUR

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St.

Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 2, "The Clean Up", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT FIVE

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 2, "The Clean Up", in

violation of Title 18, United States Code, Sections 1465, and 2.

COUNT SIX

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 4, "Black Rape", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT SEVEN

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY,

INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 4, "Black Rape", in violation of Title 18, United States Code, Sections 1462, and 2.

COUNT EIGHT

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did

knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious, and filthy films, that is, David's Boys, No. 14, "The Massage", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT NINE

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, las-

civious, and filthy film, that is, David's Boys, No. 14, "The Massage", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT TEN

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly transport and cause to be transported in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, for the purpose of sale and distribution obscene, lewd, lascivious and filthy films, that is, Dav's Boys, No. 17, "Loving Hands", in violation of Title 18, United States Code, Sections 1465, and 2.

COUNT ELEVEN

That, on or about the 25th day of September, 1975, GULF COAST NEWS AGENCY, INC., WILLIAM WALTER, RICHARD WILLIAM LARSON, MICHAEL JOHN GRASSI, JR., and ARTHUR RANDALL SANDERS, JR. aided and abetted by each other and others unknown to the grand jury at this time, did knowingly use and cause to be used a common carrier for carriage in interstate commerce from St. Petersburg, Florida, in the Middle District of Florida, to Atlanta, Georgia, an obscene, lewd, lascivious, and filthy film, that is, David's Boys, No. 17, "Loving Hands", in violation of Title 18, United States Code, Sections 1465, and 2.

A TRUE BILL

FOREMAN

JOHN L. BRIGGS
UNITED STATES ATTORNEY

By: /s/ Anthony J. LaSpada
ANTHONY J. LaSPADA
Assistant United States Attorney

I certify the foregoing to be a true and correct copy of the original.

Wesley R. Thies, Clerk
United States District Court
Middle District of Florida

By: /s/ Robert J. Muir
Deputy Clerk

mean?

MR. MAYOCK: Yes. That's on the motion to suppress.

THE COURT: Yes, I understand that position.

(Recess, 2:12 p.m. - 2:55 p.m.)

THE COURT: In addition to the pure motion to suppress or the traditional motion to suppress which the Court is considering in this case and has had before it for consideration throughout the course of this hearing, there is also, as last discussed with counsel, a motion made by the Defendants for the return of the property, which in the context of this case creates, in my view, an additional issue, and that is whether, even assuming the seizure of the property -- if, in fact, there was a seizure by the Government -- was proper to hold for evidentiary purposes, the Defendants might nevertheless be entitled to the return of

the property to the extent that the Government does not require it for legitimate or reasonably necessary evidentiary purposes, the property not being so far, as has been shown to the Court, contraband per se.

Now, at any other stage of this proceeding, or perhaps in another case with a different procedural posture than this one, it would be my view, on the basis of the limited research and consideration that I have been able to give to this matter, that the Defendants' position would be well taken, at least in part, and that the Court would be obliged to conduct a hearing to determine, first of all, whether or not the material is or whether probable cause exists to believe that the material may be obscene as a matter of law, and if so, whether or not the Government is in possession of material beyond that which it would need for evidentiary purposes at trial, whether the nature of the material is such that the re-

tention of possession by the Government might effectively suppress its dissemination or disclosure by the Defendants, based upon the particular type of material involved, and so on.

In this particular instance, however -- and especially since we're on the virtual eve of trial, literally -- it seems to me that the answer is supplied by the decision in Heller, itself.

At this point of the case there is no suggestion that an order or other form of final restraint is about to be imposed with respect to the material. This is to say, it's not threatened with destruction.

It's being preserved merely as evidence, and there has been no showing that seizure of these copies of the films involved have precluded exhibition of other copies of the films which one might assume, as the Court did in Heller, are available.

And inasmuch as the case is scheduled

for trial commencing no later than tomorrow morning, looking toward an imminent determination of the questions of obscenity as well as violation of the law, both by the Court and -- if not by the Court -- by the Jury, then it seems to me, as in Heller, consideration of the motion to return the property as such can await determination of those central issues at the conclusion of the trial by jury, which, as I just stated, is scheduled to begin no later than tomorrow morning.

Insofar as the motion to suppress is concerned, as I have already stated, I regard the pending motion as a very close and important and serious motion, both factually and legally.

Having heard the testimony and evidence adduced by the parties, I generally find the following facts relevant to a determination of the motion to suppress:

On or about September 25, 1975, someone

other than the moving Defendants, but a person who was acting at their explicit request, delivered into the possession of the Greyhound Bus Company in St. Petersburg twelve boxes or packages for transportation to and delivery in Atlanta, Georgia.

The Greyhound express agent on that occasion made out the delivery slips which have been received -- copies of which have been received in evidence for purposes of this proceeding as Government's Exhibit Number 1, indicating that the shipper was D & L Distributing, or D-i-s-t, at an address or addresses in Pinellas Park or St. Petersburg, Florida, and the consignee with respect to each of these boxes or items was described as Leggs, Incorporated, Atlanta, Georgia.

The boxes were transported by Greyhound to Atlanta.

When they arrived in Atlanta, they were diverted to a sub-station of the Greyhound

Bus Company in DeKalb County, Georgia, where in accordance with the usual custom of Greyhound insofar as regular customers were concerned, the agent at the DeKalb station called the local representative of a known customer, namely, L'Eggs, Incorporated, or L'Eggs Products, Incorporated, to notify that Company that packages had arrived which the agent presumed or assumed were intended for that particular customer or consignee.

As a consequence of that information received over the telephone, Mr. Horton, one of the witnesses, who was an employee of L'Eggs Products, Incorporated, in Chamblee, Georgia, drove in his automobile, as it was customary for him and other employees of that office to do, to the Greyhound sub-station where he observed these twelve packages.

He testified that when he saw the packages, they looked strange to him and

were not the type normally received in the regular course of business of his employer.

He therefore opened one of the packages and saw what he described as a film box which displayed on one side of the box certain narrative descriptions purportedly representing the content of the film enclosed as the contents of the box.

He further testified, based upon what he saw at that time, that he personally reached the conclusion that the boxes contained in his words, quote, "homosexual pornographic film," close quote.

Having reached that opinion or conclusion, he left the packages or boxes at the Greyhound substation and returned to his office or place of employment, and told his co-workers and superiors, namely, Mr. Fox and Mr. Shults, what he had observed.

At that point, Mr. Fox, being concerned -- according to his testimony, which I credit -- that his employer, namely, L'Eggs Products,

Incorporated, might become -- again, in his words -- "implicated in some way," he drove to the freight station and obtained the twelve boxes from the agent, the Greyhound agent, at that location, and returned with those boxes containing, of course, the items, which are the subject of the motion before the Court, to the office of L'Eggs Products, Incorporated, where it appears -- and I find -- that employees of L'Eggs, Incorporated, including Mr. Horton, Mr. Fox, and Mr. Shults, among others, opened the packages and examined all of the contents, to the extent of inspecting the various boxes apparently containing reels of -- individual reels of 8-millimeter film. And Mr. Shults, at least, went to the extent of opening one of two of the boxes and holding the film up to the light in an unsuccessful effort to determine whether the scenes depicted on the film would be discernible to the naked eye. -- I say "unsuccessful," because, as he

testified, the film was too small to be able to ascertain from a naked eye examination what the frames of the film depicted.

Each of the witnesses also testified, however, that they reached the conclusion subjectively, from the narrative description material printed on the boxes concerning the several films, that the films did relate to what they referred to as "homosexual pornographic material."

Because of those subjective conclusions, Mr. Horton at the suggestion, I believe -- or, at least, the acquiescence and concurrence -- of Mr. Fox and Mr. Shultz -- telephoned his wife, who coincidentally at that time was employed as a clerical employee by the Atlanta office of the Federal Bureau of Investigation, and at that time spoke on the telephone to Agent Mandyck who happened to be in the FBI office at the time the telephone call was made.

The purpose of making the telephone

call, according to the testimony of Mr. Horton as well as that of Mr. Fox, and especially Mr. Shults, was to make a determination from their point of view as to whether or not this material or possession of it was illegal, and if so, whether or not the FBI would come and take possession of it.

With respect to that I find, based upon the testimony of all the witnesses, including that of Agent Mandyck, that Mr. Horton was told by Agent Mandyck that the material, based upon his description, might be or probably was unlawful to possess, or that there had been a violation of it had been transported in interstate commerce. And in response to the request of Mr. Horton and his colleagues that the FBI take possession of the material, Agent Mandyck told Mr. Horton to put it aside where, in Mr. Horton's words, "it won't be bothered," and the FBI would come and pick it up, which, of course,

occurred approximately five days later, according to the testimony of Agent Mandyck, which I credit on that point.

He, in the company apparently of Agent Prekopio, visited the business premises of L'Eggs Products, Incorporated, some four or five days subsequent to the initial telephone communication, at which time the two FBI Agents took in their possession the entire twelve boxes or cartons of smaller boxes of individual reels of film -- all of the materials that are now the subject of the motion -- which the FBI has retained in its possession continuously since that time.

And thereafter, according to the testimony of Agent Mandyck which I also credit on the point, he has viewed representative reels of each of the separate films contained within these cartons in order to prepare narrative summaries of the contents of each film.

At no point in time, even up until today, has any representative of the Government either applied for or obtained any warrant with respect to the Government's possession of these materials to either search or seize such materials.

On the other hand -- to go back for a moment -- I also find that at no time in the factual circumstances which I have recited, insofar as the activities of either Mr. Horton, Mr. Fox or Mr. Shults are concerned -- that is to say, employees of L'Eggs Products, Incorporated -- did any of those gentlemen act either actually or constructively as agents or tools of the Government or FBI in opening, examining, or otherwise dealing with the material in question.

Rather, they acted of their own volition in everything that they did, including the delivery or transfer of the possession of the material, itself, to the FBI.

In the words of Mr. Shults, "We asked

the FBI to pick up the film," quote, unquote.

It is true, of course -- and I so find, though I do not deem it to be germane to the question of the legality of the taking of the film by the FBI -- that Agent Mandyck did instruct representatives of L'Eggs Products, Incorporated, as well as representatives of Greyhound, to attempt to determine the identity of any person or persons who might telephone or otherwise call for or make inquiry about the material after its existence had been called to the attention of the FBI, but that that was the extent of the request made or instruction given by FBI agents to any of the private persons involved, to the extent disclosed by the evidence -- credible evidence in the record before me.

I further find with respect to the lack of a warrant, as already mentioned, that neither was there any formal motion or request made by any third party or either of the moving Defendants for either an adversary

hearing or return of the property prior to the instant motion which the Court is in the process of considering and deciding.

Now, with respect to the legal issues in the matter and my conclusions of law, the first legal issue to be resolved, as I see it, and as urged by the parties, is the issue of the Defendants' standing to urge the motion to suppress.

That general issue, as I perceive it, is made up of two component issues.

The first is whether or not the Defendants have shown sufficient proprietary or possessory interest in the material to be heard -- to urge a motion to suppress.

On that point I conclude that as to that aspect of standing, the Defendants do have standing to assert the motion, based upon the decisions in Jones, Simmons, in the Supreme Court, and Kelley in the Eight Circuit, the authorities cited by counsel in the legal memoranda in the case.

To hold otherwise would permit the

Government to take essentially inconsistent positions, in my view, in this case.

It is alleged in the substantive count, as distinguished from the conspiracy count of the Indictment, that each of the moving Defendants either transported or caused to be transported the subject materials in interstate commerce. And one of the essential elements of that charge, it seems to me, is to show -- even though possession per se is not an element of the offense -- in effect, constructive possession is, in order to show that the Defendants caused that transportation to occur, as stated in Kelley.

And while, as I shall state in a few moments, I do not believe that the Eighth Circuit decision in Kelley is the best available authority on all of the points that I have to decide, I believe that it is correct with respect to the standing issue insofar as proprietary and possessory interests are concerned, and that the Defendants do have standing in that respect.

Whether, however, the Defendants had under the circumstances of this case -- or retained and maintained -- a reasonable expectation of privacy in the material involved, which is the other aspect of the standing issue, it is my conclusion that they did not.

The evidence shows -- and I should have found as a fact, and do now find as a fact -- that both the name and address of the alleged shipper as supplied to the Greyhound freight agent in St. Petersburg at the time and place the items were shipped, as well as the name of the consignee in Atlanta -- namely, Leggs, Inc. -- were fictitious names, and in the instance of the shipper the address as well.

And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common carrier, namely, Greyhound Bus Lines, with a fictitious name given for the shipper as well as the fictitious name given for the

consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy.

Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be mis-delivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded.

Now, there are two things I would add to that.

The first is that the explanation suggested, that the selection of a fictitious name for the shipment of such materials serves the legitimate object of avoiding what would otherwise be an open invitation to pilferage or the like, and therefore should not be found to be a relinquishment or abandonment of a reasonable expectation of privacy, is simply non sequitur.

While it may be true that the use of the real name of the consignee in some situations for whom material of this type would be intended would, in effect, disclose its contents and therefore invite pilferage by those would have its temporary custody along the way, may be a legitimate fear, the selection of a fictitious name for the consignee is not necessary or, in my view, even a reasonable response.

A more reasonable method, it would seem to me, of avoiding that undesirable effect would be to use the true name or surname of an individual rather than some fictitious name, which, as I say again, has a higher capacity or likelihood for resulting in precisely what resulted in this case, namely, exposure of the material to the inquiring eyes of innocent third parties.

And I believe as I have stated, and would conclude -- though I would acknowledge that the law is unclear at best with respect to it -- that those sequence -- those

events, rather, in that sequence would constitute a relinquishment of any expectation of privacy.

One other comment I would make with respect to that.

Mr. Zell suggested in his argument that to find that those circumstances would result in an abandonment or relinquishment in law of a reasonable expectation of privacy cannot be squared with the factual situation, for example, in *Road vs. Kentucky*, which involved a public showing of a film, but not in the process a relinquishment of the right of expectancy of privacy in the film, itself.

I think the distinction lies in what constitutes the property in which privacy is expected. It is not the content of the film, but the film, itself, as to which there was no relinquishment of the proprietor's expectancy of privacy or retained possession and control in *Roaden*, which is the distinguishing point, I think, between that decision and this one.

Here the film or the negative, itself, was let out of the possession of those having proprietary or possessory interest, delivered into the hands of a common carrier, addressed to a fictitious addressee -- but one which as it turns out, generically at least, actually existed -- resulting in innocent third party discovery.

The other issues -- legal issues presented by the motion would involve the question of whether or not, first, there was a private or a Governmental search.

The most pertinent authorities on that issue, I believe, that have been cited to the Court are the *Sherwin* case, the en banc decision in the Ninth Circuit; the *Haes* case, *H-a-e-s*, in the Eighth Circuit; the *Entringer* case in the Eighth Circuit; and also the *Kelley* case in the Eighth Circuit.

I think it is correct that the *Haes* case comes closest to supporting the moving Defendants' position with respect to that issue than any of the others.

The distinguishing feature I think in this case, however, is that here as in Entringer there was sufficient descriptive material accompanying the film, itself, to enable the private persons who were examining the material to form a subjective conclusion that the material was probably pornographic.

I would hasten to add, however, that I am inclined personally to agree with Judge Webster, who dissented in the Haes case, that a subjective private determination should never be made the touchstone upon which Fourth Amendment rights are made to depend.

Rather, I think the decision in Sherwin, which rejects Kelley and, implicitly, Haes on that point, is the better reasoned authority.

There was simply no Governmental involvement in the initial search, if you will, of these packages, and review of their contents. That was all carried out by representatives of L'Eggs Products, Incorporated,

as I have already found as a fact, and was not tainted in any way by Governmental instigation or involvement.

It was a private search, under the authorities -- even Haes, for that matter -- not subject to Fourth Amendment constraints.

The closer and, I think, ultimately more important issue in the case is whether or not there was -- if not a Government search -- nevertheless, a Government seizure. And this, of course, is the importance of the recent Ninth Circuit en banc decision in United States v. Sherwin.

Now, as pointed out during argument, there was in Sherwin a warrant obtained -- however, only after the Government had come into possession of two copies of certain books. And that initial aspect of the case, in my view, is factually indistinguishable from the circumstances presented in this case.

And the Court determined -- and I repeat that I was an en banc decision -- that there was no seizure in Fourth Amendment parlance

involved in the case, because of the consensual transfer of the material by the private searcher to the Government. And I believe that that is a persuasive opinion by virtue of the closeness to this case, and until the Fifth Circuit holds otherwise, it is entitled to be followed and applied.

So, in summary, based upon the facts as I have found them, my legal conclusion is that the motion to suppress should be denied because of a lack of reasonable expectation of privacy on the part of the moving Defendants in the materials in question, and alternatively, in any event, that there was a private search and no Government seizure within the meaning of the Fourth Amendment, in any event, based upon, principally, the decision in *United States v. Sherwin*, 539 Federal 2d, Page 1, decided en banc in the Ninth Circuit last year.

And I will summarize by way of repetition what I stated at the outset with respect to the Defendants' motion for return of the

property over and above or beyond that legitimately required by the Government for evidentiary purposes in this case, and/or for a prior evidentiary hearing or adversary hearing incident to a determination as to what the ultimate disposition of the material may be. I, in effect, reserve ruling on that motion pending the evidence to be taken at trial, which is due to commence tomorrow morning, in all events. And that will be the Order of the Court with respect to the pending motion.

Is there anything else that needs to be taken up in this case this afternoon?

MR. MAYOCK: Yes, Your Honor, there is. I have a number of things I would like to bring to

MR. LUND: Your Honor, I would submit the jurors -- if they haven't seen the evidence, it's going to be in evidence in the deliberation.

THE COURT: Well, I understand.

I made it a point to observe the jury from time to time during the publication of each of these exhibits. It seems to me that the jury is paying strict attention with the possible exception of Mr. Kohring and Mrs. Silver, who is not one of the jurors named by Mr. Mayock.

MR. MAYOCK: I couldn't see her.

THE COURT: On the other hand, it seems to me that, at least, I would say seven out of the ten times that I have observed or may have observed the jury, that those jurors were viewing the films, and they were noticed by me to have averted their eyes on two occasions.


But I don't think the situation is one of such inattentiveness as requires inter-

vention by me at this time.

And then, as Mr. Lund points out, the exhibits will be available for the jury's further view during deliberations, if they request to do so.

MR. MAYOCK: Fine, Your Honor.

Can the record reflect at this point in time



obscene or not, and would request at this time that he be excused.

And I think the Court probably was aware of the fact that he wasn't viewing the films either.

THE COURT: Well, I observed the jury, Mr. Mayock, and made it a point to do so from time to time on numerous occasions during the publication of the exhibits. And I would simply restate what I had to say at Sidebar at this particular time.

I do not believe that any individual juror was so inattentive during publication as to require excusal.

The record will reflect the motion and request.

And we'll take a fifteen minute recess.

(Recess, 3:04 p.m. to 3:18 p.m.)

(Jury not present following recess)

THE COURT: Are you ready to proceed with your witness, Mr. Mayock?

MR. MAYOCK: I am, Your Honor.

THE COURT: Seat the jury, Marshal.

I will of course, announce to the jury that the witness is being called out of turn

(Jury recalled and present)

THE COURT: Thank you. Be seated, ladies and gentlemen.

in those matters in which it might still be available?

MR. HALL: I have give him advice on that point, Your Honor.

THE COURT: Pardon me?

MR. HALL: I have given him advice on that, Your Honor.

THE COURT: And what was the advice -- to assert it or not to assert it?

MR. HALL: To assert it when appropriate.

THE COURT: All right. Thank you, Mr. Hall.

Do you have any further statement you wish to make to the Court with respect to that, then, Mr. Mayock?

MR. MAYOCK: No, Your Honor. I'll submit the matter.

THE COURT: Well, it seems to me that while, obviously, the circumstances are not precisely the same, inasmuch as Mr. Grassi is not a Defendant on trial, that,

nevertheless, the circumstances are substantially the same in principle with those normally presented when a severance is sought by a defendant who seeks to call a co-defendant -- who is on trial -- as a defense witness. So that, it seems to me, the principles of the Fifth Circuit decisions in that area. namely, United States -- I believe these are some of the decisions -- United States vs. Byrd, United States vs. Cochran, United States vs. Diaz, principally, would apply. And given the assertion of the privileges which the witness would intend to assert, and the lack of a showing of exculpatory testimony --

MR. MAYOCK: Your Honor, can I make a proffer as far as exculpatory testimony?

THE COURT: Well, that's why I asked you if you had anything else to say to the Court, Mr. Mayock.

MR. MAYOCK: Fine, Your Honor. I think it's very important. --

MR. LUND: Your Honor, before a proffer is made, we would request that Mr. Grassi leave the Courtroom.

THE COURT: Very well. I think that may be a proper request.

You may withdraw, Mr. Grassi.

(Witness retires from Courtroom.)

THE COURT: Go ahead, Mr. Mayock.

MR. MAYOCK: Thank you, Your Honor.

I think it's apparent that what Mr Grassi can testify to is that Mr. Walter was the owner of other corporations, such as Ashley Art, Gay Paree, Classic Art Corporation, and that those were the basic enterprises in which Mr. Walter was engaged, and not the ones named -- the particular corporations named in any way in the first count of the Indictment or as Defendants in this case.

And, moreover, I believe Mr. Grassi can testify to the fact that Mr. Walter had never seen the films in question.

That's entirely consistent with the testimony he gave during the course of the motion to suppress, that he didn't know anything about the nature, contents and character of these films.

And accordingly, that would definitely go to the knowledge element which the Government has to prove beyond a reasonable doubt, and I think Mr. Walter's case would be severely and irreparably prejudiced if he weren't allowed to elicit this information from this witness.

THE COURT: All right. The record will show that proffer. And I am still of the view that the requirements of the decisions I mentioned have not been met, and I would preclude in this case the Defendant from calling the witness Grassi.

The record will so reflect.

MR. MAYOCK: Your Honor, could I inquire about those decisions? Do those involve co-defendants who have not entered

pleas?

THE COURT: I believe they involve both,

What evidence is there in the record to sustain the allegations of Overt Act Number 3 of Count One, the conspiracy Count, Mr. Lund?

MR. LUND: Your Honor, there is no evidence of that.

THE COURT: All right. I'll strike Overt Act Number 3 of Count One at the present time.

But I will otherwise deny the motion for judgment of acquittal, as well as the other motions made and renewed by counsel in behalf of each of the Defendants.

Do you gentlemen have other witnesses that you wish to call as defense witnesses in the case?

MR. MAYOCK: Yes, Your Honor.

THE COURT: All right. You'll be ready to proceed with those at 1:30, Mr. Mayock?

MR. MAYOCK: I'll be ready at 1:30, Your Honor, to proceed with one witness.

What I am trying to do -- not knowing exactly when the prosecution would rest in this matter -- is to try to schedule witnesses to appear at as close a point in time to this as possible. During the Noon hour I will attempt to have somebody confirm the fact that they are flying from Los Angeles here.

THE COURT: All right.

Finally, they ended up telling him, "Well, the stock issue was issued in blank."

Mr. Boshell kept pushing and telling him he needed that information for the tax return file. And then the letter was written by Mr. Zell setting forth Carol Maxey and Michael Grassi and Woodruff and Mr. Akins as the hundred per cent stockholders.

That's powerful circumstantial evidence, Your Honor, as to consciousness of guilt, if you will -- as to knowledge, on the other hand -- that they knew that they were violating the law. They knew that the materials that were being shipped in interstate commerce were obscene materials.

One additional piece of circumstantial evidence is the fact that the shipment in question here was addressed to the name of "Leggs", a fictitious name. And the reason Mr. Bowman gave for that particular

address was because, if the shipment was misdirected or confiscated in any way, it wouldn't be directed or it wouldn't be linked to Gulf Coast News or TWA warehouse.

That's additional powerful, I believe, circumstantial evidence of guilt and circumstantial evidence of knowledge on behalf of Mr. Walter.

THE COURT: All right. It seems to me the Government's case may be something less than overwhelming with respect to that element of the substantive offenses insofar as the Defendant Walter is concerned. But based upon the argument of counsel concerning circumstantial reliance -- reliance upon circumstantial evidence, and the theory of agency or aiding and abetting, it seems to me the case is sufficient to go to the Jury, and I will deny motion for judgment of acquittal under Rule 29, as well as the other motions made and renewed by defense counsel, and submit the case to the Jury

at this point.

Now, counsel have previously been given a complete set of tentative jury instructions that I had earlier prepared with reference to this case.

I have here, first of all, two additional pages and one substitute page.

Mr. Gay, give each lawyer one copy of these three pages, please. (Handing)

MR. MAYOCK: Your Honor, during the evening I had occasion, in conjunction with Dr. Cline's testimony, to ten put two additional instructions which I would like to proffer at this time.

Inasmuch as I only have the original --

THE COURT: Excuse me, Mr. Mayock.

Mr. Gay, I don't believe you can pass them out that way. Those pages were clipped together. They are multiple copies of the same page. Give each lawyer one copy of each set, will you?

MR. MAYOCK: Your Honor, if it would

help counsel, I could read these, so that -- because I only have this one copy -- they would know exactly what I am talking about.

THE COURT: All right. Go ahead, Mr. Mayock.

MR. MAYOCK: I would propose this as Defendant's Number 55, as follows:

There has been some testimony regarding the potential for harm that certain materials in question may have upon a susceptible individual. You are instructed that the question of harm -- if, indeed, you should find it to exist -- bears only upon the third prong of the obscenity test, that is, whether the films in question are utterly without redeeming social importance.

"You are further instructed that films may have social importance and, yet, at the same time have a potential for harm. The two are not inconsistent.

"Remember, at all times the burden is upon the prosecution to prove the films in question to be utterly without redeeming social value. If after deliberating you conclude that a film has a potential for

intended for sale or distribution, but such presumption is rebuttable.

One of the essential elements the Government must prove is the element of scienter or knowledge; that is, that the defendant knew the general nature of the contents of the articles which were transported in interstate commerce. The Government does not have the obligation of showing that the defendant knew that such articles were in fact legally obscene.

Therefore, if you find beyond a reasonable doubt that the defendant transported in interstate commerce the articles in question, and that he knew the general nature of the articles, that is, he knew what they actually were, and if you find beyond a reasonable doubt that the articles were in fact "obscene" within the meaning of these instructions, then you may find that the defendant had the requisite knowledge, or scienter as we

call it in the law.

Freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of a Constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely, and publicly.

Material is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity. However, the Constitutional right to free expression does not extend to that which is "obscene."

"Obscene" means something which deals with sex in such a manner that the predominant appeal of the material, viewed in its entirety, is to the prurient interest of the average person of the community as a whole, or the prurient interest of a deviant sexual group, as the case might be, and is so patently offensive that it is

utterly without redeeming social value.

An appeal to prurient interest is an appeal to a morbid, degrading and unhealthy interest in sex, as distinguished from a mere candid interest in sex.

The first test to be applied, therefore, in determining whether given material is obscene, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.

The "predominant theme or purpose of the material, when viewed as a whole," means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental scenes or

isolated passages or sequences.

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex.

Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms

of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.

An appeal to prurient interest, as stated before, is an appeal to a morbid, degrading and unhealthy interest in sex as distinguished from a candid interest in sex.

The second test to be applied in determining whether given material is obscene is whether it depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation, excretory functions; or lewd exhibition of the genitals.

In making that judgment, however, you must not condemn by your own standards, if you believe them to be stricter than those

generally held; and you must not excuse by your own standards, if you believe them to be tolerant than those generally held. Rather, yo must measure whether the material is patently offensive by contemporary community standards; that is, whether it so exceeds the generally accepted limits of candor as to be clearly offensive.

Contemporary community standards are those established by what is generally accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some groups of persons may

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WILLIAM WALTER

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM WALTER, et al.,

Defendants.

No. 77-49-Cr-T-H

DEFENDANTS' REQUESTED VOIR DIRE
EXAMINATIONS

COMES NOW Defendant WILLIAM WALTER who does request that the Honorable Court present the following questions on voir dire examination of the jury in the above entitled and numbered case:

1. How much education have you had?
2. Do you attend church on a regular

basis? If so, how often?

3. If you were required to view a movie in this courtroom with other persons of the opposite sex on this jury, and the film depicted explicit sexual conduct, would you be shocked? If you would be shocked would you be able to overcome your personal feelings and be able to still decide the case, without regard to whatever personal feelings you had, and strictly on the basis of the evidence?

4. Assume that you viewed the films and brochures involved in this case and personally believed them to be obscene according to your own belief, but under the law as given by the Judge you found that said materials were not legally obscene, would you have any hesitancy to acquit the defendant?

5. Are you or any member of the jury, in any way related to any party in this action, either the Court, counsel for the Government, counsel for the Defendant, or any peace officers, marshals, or officers of the United States Government which may or might have been

involved in the gathering of evidence or in the prosecution of this case on behalf of the Government?

6. Are you, or is any member of this jury, a member of a religious organization? As such, do any of you have any personal convictions which would prevent you from fairly and honestly believing in the principle that a defendant charged with an offense of this nature has the right to place the burden upon the Government to prove its case beyond a reasonable doubt?

7. Is there any member of this jury who has ever served in a jury case previous to being on this panel, and if so, without stating the nature of the outcome of that case, will you state the subject matter that was before the court in that case?

8. Have you or any of you read any newspaper or television accounts of this case, and if so, from the accounts you have read, have you formed or expressed any opinion as to the merits of this case?

9. Have you or any of you formed any opinion as to the guilt or innocence of the defendant in this case?

10. Have you or any of you any impression or opinion as to the merits of this case?

11. If you have formed an opinion as to the guilt or innocence of this defendant, would it require evidence to change or remove the opinion you entertain?

12. Knowing what you do about this case and the opinion you have formed of its merits, would you be entirely satisfied to be tried by a jury which holds your present frame of mind if you were the person charged with this offense?

13. If you or any of you are sworn as a juror would you lay aside any opinion you may now have and act solely upon the evidence introduced here and the instruction of the court?

14. Have you or any of you ever been the complaining witness in a criminal case or has any member of your family or close per-

sonal friend been?

15. Could you or any of you give the defendant the same fair trial, considering the nature of the charge against him, as you could if he were charged with any other offense?

16. If the prosecution does not satisfy you, or any of you, by the evidence, beyond a reasonable doubt, of the guilt of the defendant, will you vote for a verdict of not guilty?

17. Do you and each of you understand that under the law the defendant is not required to prove his innocence in this case but that it is the duty of the prosecutor to prove his guilt beyond a reasonable doubt?

18. Would you, and each of you, render a verdict in this case according to the law and the evidence and not allow the fear of criticism from any source to influence your verdict?

19. Would your verdict be based solely on the evidence and instructions on the law

given you by the Court and not be influenced by any other matter or thing?

20. Would you, and each of you, give the defendant the benefit of your reasonable doubt, if you had such doubt, and find the defendant not guilty?

21. Would you, or any of you, allow the fact that a number of jurors were voting differently than you were to influence you to change your verdict for that reason alone?

22. The defendant is presumed to be innocent under the law until he is found guilty. Would you, and each of you, give him the benefit of that presumption in considering the evidence in this case and find him not guilty unless you are satisfied of his guilt beyond a reasonable doubt?

23. If you, or any of you, have a reasonable doubt as to the guilt or innocence of the defendant, will you give him the benefit of the doubt and find him not guilty?

24. Do you, and each of you, understand

that you may believe as men and women that certain facts exist but as jurors you can act only upon the evidence introduced upon the trial of this case and from that and that only you must arrive at your verdict?

25. Do you, and each of you, understand that after consideration of the whole case and all the evidence you should entertain a reasonable doubt of the guilt of the defendant it is your duty not to vote for a verdict of guilty nor to be influenced in such voting by the single reason that a majority of the jurors are in favor of a verdict of guilty?

26. If the evidence relating to any or all the facts in this case in view of all the evidence, is susceptible of two reasonable interpretations, one of which would point to the defendant's guilt and the other would indicate his innocence, then do you understand that it is your duty in considering such evidence to adopt that interpretation which points to the defendant's inno-

cence and reject that which points to his guilt?

27. If you, or any of you, are sworn as a juror in this case could you and would you give the defendant a fair and impartial trial?

28. Do you know the United States Attorney for this District?

29. Do you know anyone employed or connected with, either directly or indirectly, the staff of the United States Attorney for this District, or any District? If the answer to either of the foregoing is in the affirmative, please ask the prospective juror:

(a) How and under what circumstances have you known him or her?

(b) How well do you know him or her?

(c) How long have you known him or her?

30. Where do you live?

31. How long have you lived in the Middle District of Florida?

32. From where do you come to the Middle District of Florida?

33. In what other places have you resided?

34. Are you married?

35. What is the name of your spouse?

36. What grade have you reached in your formal schooling?

37. What schools did you attend?

38. Do you have any children? If the answer to the foregoing is in the affirmative please ask the prospective juror:

(a) Number of children.

(b) Age and sex.

(c) Do they attend public, private or parochial schools.

(d) Specify the schools.

39. Do you live with your spouse and children, if any?

40. What is your occupation?

41. What is the nature of your duties, i.e., what do you do?

42. What is the occupation of the person or persons with whom you live?

43. What is the nature of their duties, i.e., what do they do?

44. What is the nature of your employer's business?

45. If you or your spouse are self-employed, what is the name and nature of the business?

46. Are any of you or your spouses federal employees? If so, state the job and its duties?

47. Would such employment cause you to be influenced in your verdict in favor of the Government?

48. Have you ever been employed by the Federal Government?

49. What was your employment?

50. Under what circumstances did you leave it?

51. Are you seeking employment by the Federal Government?

52. What employment are you seeking?

53. Are any of your relatives or friends employed by the Federal Government?

54. Which ones?

55. What is the nature of their employment?

56. As a result of such employment by your relatives or friends, and in view of the nature of the charge in this case, would you be influenced in your verdict or be embarrassed in any way if you sat as a juror in this case?

57. Are any of your relatives or friends seeking employment by the Federal Government?

58. What employment?

59. Are you related or acquainted with any employee of the Department of Justice, the FBI, the Post Office Department, the Treasury Department or the Customs Bureau? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) With whom?

(b) What is his or her position?

(c) How long have you known him or her?

(d) How well do you know him or her?

(e) Would such friendship influence you in your verdict?

60. Are you or is any member of your family or are any of your relatives or friends employed by or associated with any other agency, public or private, which is engaged in any aspect of law enforcement?

61. If the answer to the foregoing is in the affirmative please ask the prospective juror the following?

(a) Who is so employed?

(b) What is his or her position?

(c) What is the name of the agency?

(d) What kind of work does it do?

(e) What kind of work does your friend or relative actually do?

(f) How long have you known him or her?

(g) How well do you know him or her?

(h) Would the relationship of that person to their law enforcement job have any influence on you in your verdict in this case?

62. Have you or any member of your family or any of your friends given information by testimony or otherwise to any committee or any other governmental agency reported to be investigating the circulation of alleged pornography? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) Who gave the information?

(b) Was it given voluntarily?

(c) Was it given under subpoena?

(d) How was contact with the committee or agency first established?

(e) Did you or your relative or friend search out the committee or agency, or vice versa?

(f) Would such matters have any influence on your verdict in this case?

63. What was the kind of information given?

64. What did it deal with?

65. Have you ever read any reports or

transcripts of hearings of any state or federal legislative committee investigating the circulation of alleged pornography? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) What reports or testimony, have you read?

(b) How did you happen to read such a report of such testimony?

(c) With what person or association did the report or testimony deal?

(d) Would such readings have any influence on you against this defendant in your verdict?

66. Have you ever read any newspaper accounts of the testimony taken before or the reports issued by such aforesaid committee?

67. As a result of reading such newspaper accounts, have you formed an opinion concerning the distribution of pornography?

68. What is that opinion?

69. Have you ever served as a juror before? If the answer to the foregoing is in the affirmative, please ask the prospective juror the following:

(a) Have you served in a civil or criminal case?

(b) On how many cases have you served?

(c) Were any of the attorneys presently prosecuting the case on behalf of the Government attorneys in that or those cases?

70. Have you or any member of your family or relatives or friends ever been a member of, made contributions or, or associated in any way with any of the following organizations?

(a) National Office for Decent Literature?

(b) Legion of Decency?

(c) Citizens for Decent Literature?

71. Do you subscribe or have you ever read any of the books or publications put out by the National Office for Decent Literature, Legion of Decency, or Citizens for Decent Literature? If the answer to the foregoing

is in the affirmative, please ask the prospective juror the following:

(a) Is there anything that has come to your attention as a result of these connections which has caused you to form a preconceived opinion of guilty or innocence in this case?

(b) Is there anything that has come to your attention as a result of these connections which has given you any feelings of dislike or hostility toward this defendant?

72. Has any prospective juror or any of his relatives at any time been a member of, made contributions to, or been associated in any way with any organization of any kind or character which has for one of its principal purposes opposition to the circulation of alleged pornography? If the answer to the foregoing is in the affirmative, please ask the following?

(a) What is the name of the organization?

(b) What was your connection or association with it?

(c) How long were you associated with it?

(d) Did you ever hold office in it?

(e) Would such connection be an influence on you in your verdict in this case?

73. Have you ever expressed your self in writing or otherwise in favor of legislation outlawing or punishing the distribution of allegedly obscene matters and things?

74. Are you in favor of such legislation?

75. Though not an active member in any of the organizations I mentioned, did you or any member of your family attempt to join any organization or association which has as one of its purposes opposition to the distribution of allegedly obscene matters and things. If the answer to the foregoing is in the affirmative, please ask the following:

(a) What is the name of the organization or association?

(b) How was the attempt made?

(c) The reason for not joining?

76. Has any prospective juror or any of its relatives listed your names and addresses with the Post Office, so as not to receive pornography items through the mails at your homes? If so, when did you take such action? Why?

77. Does any prospective juror subscribe to or share the purposes or goals of any organization or association with advocates stricter laws against the distribution of allegedly obscene matters?

78. Whether in school, college, or in private life, has any prospective juror read any book dealing with the subject matter of or describing acts of:

- (a) Prostitution;
- (b) Lesbianism;
- (c) Homosexuality;
- (d) Adultery;
- (e) Rape;

(f) Incest;

(g) Frigidity;

(h) Oral-genital contact;

(i) Impotence;

(j) Sexual intercourse;

(k) Bondage and Discipline (sado-masochism).

80. Have you heard any discussion of the subject of obscenity or censorship in your place of worship? If the answer is in the affirmative, tell us where and when the discussion took place and who the speaker was.

81. Do you feel that your personal predilections, your educational background, and/or your religious beliefs might influence you consciously or unconsciously in attempting to determine whether the books involved in this trial are obscene, and on the guilt or innocence of the accused citizen?

82. Do you have any personal reservations about discussing with the opposite sex

any magazine, newspaper, play or theatrical performance dealing with the aforesaid subjects or describing or depicting sexual matters?

83. If the Court should advise you that the challenged materials must be measured by their impact on the average person and not by their impact on minors or young persons or particularly susceptible persons, would you be willing and able to follow the Court's instruction in that regard?

84. Do you believe that the free speech provisions of the First Amendment to the United States Constitution should protect books and movies even though they may be thought to be tasteless or objectionable to you personally?

85. Do you personally believe there is any value in discussing sexual matters candidly?

86. Have you read any books or seen any films which you think should not be distributed or sold to adults? if the answers is

in the affirmative:

(a) Name the books or films.

(b) Describe subjects deemed offensive, if any.

(c) State the reason for your belief.

87. If the court should advise you that a book or film may not be considered obscene in law unless it goes substantially beyond contemporary community standards in its description or representation of sex, would you be willing and able to follow the court's instruction in that regard?

88. If the court should advise you that a book or film may not be considered obscene in law merely because it depicts the nude body, including the genital area, would you be willing and able to follow the court's instruction in that regard?

89. If the court should advise you that a book or film may not be considered obscene in law merely because the subject matter of the book describes acts of prostitution,

lesbianism, homosexuality, adultery, rape, incest, frigidity, oral-genital contact, impotence, sexual intercourse, or sado-masochism, would you be willing and able to follow the court's instructions in that regard?

90. If the court should advise you that a book or film cannot be deemed obscene if it has any social value, even if the book appeals to prurient interest and goes beyond contemporary community standards, would you be willing and able to follow the court's instructions in that regard?

91. If the court should advise you that the social value of a book or film may not be weighed against its alleged appeal to the prurient interest, that is, if the book has social value then for that reason alone it cannot be deemed obscene, would you be willing and able to follow the court's instruction in that regard?

92. If the court should advise you that

in judging contemporary community standards you must not judge such standards by what you think they ought to be, but what they actually are, that is, what is circulated in the nation in books, magazines, plays, photographs and films with respect to the depiction of sex, sexual activities and nudity, would you be willing and able to follow the court's instruction in that regard?

93. If the court should advise you that a book or film may not be deemed obscene merely because it arouses an erotic or sexual interest, but can only be deemed obscene if it appeals to a shameful or morbid interest in sex, would you be willing and able to follow the court's instructions in that regard?

94. Has any prospective juror read the official report of the Commission on Obscenity and Pornography? If so, do you disagree with the findings by the majority of the report, or do you agree with the findings of the majority of the report?

95. Are any of your close friends, relatives or associates connected in any way with law enforcement or a prosecutorial agency?

96. Other things being equal, would you tend to believe a law enforcement officer more than you would an ordinary citizen?

97. Do you belong to any religious, fraternal, political or social organization which has taken a stand on the issue of obscenity or pornography?

98. Have you ever had occasion to pass or notice an adult theatre or adult bookstore in this community?

99. Did anything about the exterior portion of that theatre/bookstore shock or offend you in any way?

100. Does it disturb or bother you that adults patronize these businesses?

101. Have you seen any of the advertisements of any of these so-called adult theatres? If so, has there been anything about the nature or content of the adver-

tisements of any of these so-called adult theatres that has offended you?

102. Do you feel that the availability in the community of sexually explicit or graphic materials is on the increase or the decrease?

103. Does this fact disturb or offend you?

104. Have you personally ever been exposed or have you known of persons who were exposed to sexually explicit or graphic materials?

105. Have you ever known of anyone to have been harmed or hurt in any way by exposure to sexually explicit or graphic materials?

106. Do you know of any evidence or information that indicates a causal connection between exposure to sexually explicit materials and anti-social behavior_

107. Are you familiar with the use of sexually explicit materials as part of a sex therapy program?

108. Psychologists, psychiatrists and

other experts will be called to testify about the films in question. Do you have any bias or prejudice against or would you tend to disbelieve a psychologist or psychiatrist simply because of their work?

109. Does the fact that an individual earns his living by dealing in and with adult material disturb or offend you?

110. If chosen to sit as a juror, you will be caused to view films wherein certain sexual activity is graphically and explicitly portrayed. Does this prospect cause you any discomfort or embarrassment?

111. Will you be able to view films which depict certain sexually explicit activities, including mouth and genital contact, anal intercourse, ejaculation, homosexual activity and interracial sex with open eyes and an open mind?

112. Will you base your judgment as to the merits of the films exclusively upon the films themselves and the evidence as pre-

sented to you in court and not upon your own personal taste and personal standards as to what may or may not be obscene?

113. Have you read or heard about any polls, surveys or studies taken with reference to American adults' views on obscenity or pornography?

114. Which, if any, of the following movies have you seen:

Misty Beethoven

Deep Throat

Devil in Miss Jones

Behind the Green Door

The Story of O

The French Connection

Expose me, Lovely

Last Tango in Paris

Emmanuelle

The Sailor Who Fell From Grace With The Sea.

115. Which, if any, of the following material have you read:

Fear of Flying

Human Sexual Response

What You Always Wanted to Know About

Sex, But Were Afraid To Ask

Playboy

The Story of O

The Hite Report

The Joy of Sex

Viva

Penthouse

The Sensuous Woman

Oui

Playgirl

Scientific or psychology magazines

or journals.

116. Do you presently have an opinion as to what materials adults should be allowed to see and read?

117. Has any organization to which you belong advocated a change in the obscenity laws? If so, do you realize that the law must be changed by the legislature and not

by you as a juror, and that you must follow the law as the Court instructs?

118. The Court will ins-ruct you at the close of the case that you must find three elements to exist beyond a reasonable doubt before you can find material obscene. If you are satisfied that any two of the elements are proved but you have a reasonable doubt about the third, will you, nevertheless, vote for acquittal?

119. What organizations do you belong to in the community?

120. In this case you will be asked to view films depicting males engaging in himosexual sexual activity. Are you personally familiar with the attitudes and norms of the homosexual community?

121. If you conclude the films in this case are directed solely at a homosexual audience, would you be willing to follow the Court's instruction to judge whether the films appeal to the morbid, sick or shame-

ful interest of homosexuals?

122. Do you believe your experience in inadequate to judge the appeal of these films to homosexuals unless expert testimony is presented?

Respectfully submitted

/s/ W. Michael Mayock

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM WALTER, et al.,

Defendants.

No. 77-49-Cr-T-H

DEFENDANTS' CONSOLIDATED PROPOSED
JURY INSTRUCTIONS

* * *

DEFENDANTS' PROPOSED INSTRUCTION NO. 16

In order to find that matter is obscene, each of the following elements must be proved beyond a reasonable doubt:

1. It is matter taken as a whole, the predominant appeal of which to the average

adult person, applying contemporary standards for the entire United States, is to a prurient interest, that is, a shameful or morbid interest in (nudity) (sex) (or) (excretion); and

2. It is matter which taken as a whole goes substantially beyond the customary limits of candor in the United States in the description or representation of such matters; and

3. It is matter which taken as a whole is utterly without redeeming social importance.

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 18

For purposes of these instructions:

1. "Adult" means all persons of the age of 18 years or older.

2. "Contemporary community standards" refers to standards in existence at or about the time the films were seized.

3. "Social value" is a measure of usefulness of press materials to society as a

whole or any part thereof.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS NO. 19

The predominant appeal to prurient interest is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 21

Because contemporary community standards may change from time to time, you may determine that no material is obscene at the present time when viewed by consenting adults.

Authorities: Miller v. California, 413 U.S. 15, 37 L.Ed. 2d 419.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 22

The term "average adult person" as used in these instructions is a hypothetical composite person who typifies the entire community.

ty including persons of both sexes; the religious and the irreligious; of all nationalities and all adult ages; all economic, educational and social standings; neither a libertine nor a prude, but with normal, healthy, average contemporary attitudes, instincts and interests concerning sex.

"Adult" means all persons of age of 18 years or older.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 23

The material must be measured by its appeal to the average adult only, and not by their appeal to minors, or highly susceptible persons. Because the adult population of the Nation cannot be reduced in reading or viewing only what is fit for children, you must not, under any circumstances, consider the impact you believe the publications might have on children.

In connection, I call your attention to the fact that the evidence shows that the material was to be sold and/or exhibited only to adults.

Authorities: Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304; Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414; Butler v. Michigan, 352 U.S. 380.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 24

You must not consider the effect, if any, this material will have upon the unbalanced or highly susceptible person, but must consider only its effect upon the average adult person. Authority: Roth v. United States, 354 U.S. 476 at 488 (1957).

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 27

CALJIC 16.186 MODIFIED

Hamling v. U.S., 418 U.S. 87, 103-104 (1974)

The contemporary community standard referred to in these instructions is set by what is, in fact, acceptable to the adult community as a whole, not by what some person or persons may believe the adult community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts, and is unacceptable

to, the adult community as a whole. While your own personal, social or moral views on material such as that charged in the complaint may not be considered, each of you is entitled to draw on your own knowledge of the views of the average adult person in the community if you can conceptualize such a person.

For the purpose of determining the prurency of the material here in question, the controlling adult community is the entire nation.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 28

PC 311(a)(1)

The predominate appeal to prurient interest of each film in this case is judged with reference to average adults unless it appears from the evidence of the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominate appeal of such film shall be judged with reference

to its intended recipient group.

There has been some evidence in this case attempting to show that the intended and probable recipients of the films were members of deviant sexual groups. If you find from all the evidence that this was the case, then you are to determine whether the material in any or all the aforementioned films appeals to the prurient interest in terms of the average member of the deviant group and not the average adult person in the community.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 29

If you find that certain films are directed at groups interested in hand and arm insertion or homosexuals and if you find that your experience is plainly inadequate to judge whether the material appeals to the prurient interest of the average adult member of such intended recipient group, then you must rely upon such expert testimony as was presented regarding what appeals to the prurient interest of the average adult member of such group.

If you determine either that the film in question did not appeal to the prurient interest of the average adult member of such intended recipient group or that the evidence was insufficient to enable you to make a determination one way or the other, then you must find the defendant not guilty as to those films. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n. 6 (1973) People v. Enskat, 33 Cal.App.3d 900, 914 (1973).

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 47

A film is not obscene merely because its subject matter may be contrary to the moral standards or predominant religious precepts of the Nation. Kingsley International Pic. Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 48

The jury is instructed that if, upon the entire case, the jury is unable to ascertain the meaning of "the average adult person," or of "contemporary community standards,"

or the meaning of "prurient interest," or the meaning of "social importance," then the Government has failed to prove its case beyond a reasonable doubt. The jury is not permitted to guess at the meaning of these terms. If the jury is of the opinion that these elements are incapable of objective measurement, then the jury should return a verdict of not guilty. Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 973; Palmer v. City of Euclid, 402 U.S. 544, 91 S.Ct. 1563.

* * *

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 54

In calculating the "average" adult person, all adults in the Nation must be included in the computation. For purposes of this computation, "average" means the mean and not the median or the mode.

CALJIC 16, 184. Roth v. U.S., 354 U.S. 476; Redrup v. New York, 386 U.S. 767; Butler v. Michigan, 352 U.S. 380; Interstate v. City of Dallas, 390 U.S. 676; Mishkin v. New York, 383 U.S. 502; J.P. Guilford, Fundamental Statis-

tics in Psychology and Education, at 62-63
(4th Ed. 1965).

W. Michael Mayock, Esq.
Penthouse Suite
10100 Santa Monica Boulevard
Los Angeles, California 90067

October 15, 1979

RE: William Walter v. United States,
No. 79-67; and
Arthur Randall Sanders, Jr., et al.
v. United States, No. 79-148

Dear Mr. Mayock:

The Court today took the following
action in the above cases:

"The petitions for writs of
certiorari are granted. The cases
are consolidated and a total of one
hour is allotted for oral argument."

Enclosed are memorandums describing the
time requirements and procedures under the
rules.

The additional docketing fee of \$50,
Rule 52(a), is due and payable in No. 79-67.

Very truly yours,

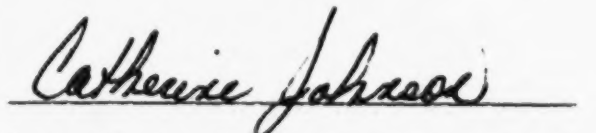
MICHAEL RODAK, JR., Clerk

By /s/ June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on December 6th, 1979 I filed with the Clerk's Office of this Court the required copies of this document and further certify that I mailed this same date from Richmond, Virginia the required copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.


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Inc.
P.O. Box 645
Richmond, Va. 23219

Nos. 79-67 and 79-148

Supreme Court, U.S.
FILED

SEP 28 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM WALTER, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR RANDALL SANDERS, JR., ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.

Solicitor General

PHILIP B. HEYMANN

Assistant Attorney General

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Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-67

WILLIAM WALTER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-148

ARTHUR RANDALL SANDERS, JR., ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-36)¹ is reported at 592 F. 2d 788.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on June

¹"Pet. App." refers to the appendix to the petition in No. 79-67.

15, 1979 (Pet. App. 37-39). The petitions for a writ of certiorari were filed on July 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether five reels of film, which were given to the government by a private party, should have been suppressed as the fruit of an unlawful search and seizure in the circumstances of this case (Nos. 79-67 and 79-148).

2. Whether the district court correctly instructed the jury to determine obscenity according to the standards of the average person in the community (Nos. 79-67 and 79-148).

3. Whether there was sufficient evidence to prove petitioner Walter's scienter (No. 79-67).

4. Whether the jury should have been instructed that the films, which were homosexual in nature, were obscene only if they appealed to the prurient interests of homosexuals (No. 79-67).

5. Whether petitioners were denied a fair trial by the alleged inattention of a juror (No. 79-67).

6. Whether the district court should have permitted more extensive questioning of prospective jurors on voir dire (No. 79-67).

7. Whether petitioner Walter should have been granted a severance (No. 79-67).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioners Walter, Sanders and Gulf Coast News Agency, Inc., were convicted on five counts of transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1465, and

on five counts of using a common carrier to transport obscene films in interstate commerce in violation of 18 U.S.C. 1462. All petitioners were convicted on one count of conspiracy, in violation of 18 U.S.C. 371. Petitioners Walter and Sanders were sentenced to concurrent terms of three years' imprisonment on all counts. Petitioner Trans World America, Inc., was fined \$10,000 and petitioner Gulf Coast News Agency, Inc., was fined \$3,000 on each count for a total fine of \$33,000. The court of appeals affirmed, Judge Wisdom dissenting (Pet. App. 1-36).

1. The evidence adduced at a pretrial suppression hearing and at trial showed that petitioners Walter and Sanders were business partners who owned a network of adult cinemas, bookstores and distribution warehouses, including co-petitioners, Gulf Coast News Agency, Inc., and Trans World America, Inc.

On September 25, 1975, an employee of Gulf Coast News, using the fictitious name "D and L Distributors," shipped twelve cartons of film by Greyhound Bus Package Express from St. Petersburg, Florida, to Atlanta, Georgia. The packages were addressed to "Leggs, Inc.," a fictitious name for Trans World America, and were marked "will call," meaning that the addressee was to call for the packages at the Greyhound station (Pet. App. 3; VII Tr. 11-13, 19).

Upon arrival of the packages in Atlanta, Greyhound forwarded the shipment to a nearby substation for retrieval by L'Eggs Products, Inc., a manufacturer of women's hosiery, whom Greyhound mistakenly believed was the intended recipient (Pet. App. 3-4; XII Tr. 33-35). In response to notification by Greyhound of the shipment's arrival, L'Eggs Products sent an employee to pick up the package. The employee, who thought the packages looked unusual, opened one, determined the

contents to be pornographic films and returned to his company to report the incident. Thereafter another employee of L'Eggs Products, Inc., picked up the cartons and transported them to the firm's plant in Chamblee, Georgia. At the plant the area manager of the hosiery company opened all twelve cartons and ascertained that they contained a series of homosexual films entitled "David's Boys" (Pet. App. 4; XII Tr. 57-66). One side of each individual film box depicted two nude men kissing while the other side explicitly described the sexual conduct portrayed in the film (see Pet. App. 4). The area manager held up one reel of film to the light but was unable to clearly view the frames. He then called the FBI, reported that he had mistakenly received a shipment of obscene films which he did not want and asked the FBI to pick up the films (*ibid.*; XII Tr. 65-57, 121-126, 144). Five days later, L'Eggs Products, Inc., voluntarily turned over the shipment to the FBI.

The FBI, unaware of the identity of the shipper or intended recipient, told employees at Greyhound and L'Eggs Product to try to get the name or phone number of anyone who inquired about the shipment (XII Tr. 51, 207-208). About two weeks after L'Eggs Products turned the films over to the FBI, petitioners discovered the whereabouts of their shipment² (XII Tr. 125; IV Tr. 3-9 (testimony of Gray)); (IV Tr. 45 (testimony of Sanders))³.

²Contrary to petitioners' claims (No. 79-67 Pet. 10; No. 79-148 Pet. 6), the district court found that there was no credible evidence that the FBI told L'Eggs or Greyhound to conceal the whereabouts of the films (IV Tr. 108). Indeed, L'Eggs told petitioners that they gave the cartons to the FBI (IV Tr. 3-9 (testimony of Gray)).

³Volume IV of the transcript includes additional, separately paginated parts each containing the testimony of Michael Gray (a co-defendant who pleaded guilty) and petitioner Sanders.

Petitioners were indicted on April 6, 1977, on charges relating to five of the films in the shipment. The first time that petitioners sought to have their films returned was on June 3, 1977—21 months after the shipment—when they filed a motion for the return of the films and their suppression in evidence.⁴ On August 9, 1977, the district court denied the suppression motion (IV Tr. 107-116).⁵ Petitioners were thereafter convicted on all counts.

The court of appeals affirmed. With respect to petitioners' Fourth Amendment claims, the court held that there had been no search or seizure by the government, and therefore no Fourth Amendment violation (Pet. App. 1-17). Judge Wisdom dissented on the ground that the FBI's holding the film for two years without a judicial determination of obscenity constituted a prior restraint (Pet. App. 18-36). The court denied rehearing in a brief opinion, in which the court noted that even if the government's retention of the films had constituted a "prior restraint," the proper remedy would be return of the films but not their suppression in evidence (Pet. App. 38-39).

ARGUMENT

1. Petitioners first argue (No. 79-67 Pet. 17-28; No. 79-148 Pet. 7-10) that the five reels of film should have been suppressed at trial as the product of an illegal search and seizure.⁶

⁴Only Sanders and Walter joined in this motion.

⁵As to the motion to return the films, the district court reserved ruling to await the outcome of trial which was to commence the next day (IV Tr. 116).

⁶As the court of appeals correctly held (Pet. App. 8), this claim is available only to petitioners Walter and Sanders, and not the corporate petitioners, since they did not move to suppress the evidence prior to trial. Fed. R. Crim. P. 12(b)(3).

As the court of appeals correctly held, however, there was neither a search nor a seizure by the government in this case and accordingly no basis for the exclusion of the films at trial. It is well settled that an unlawful search and seizure conducted by a private party, without government involvement, does not violate the Fourth Amendment and accordingly, does not trigger the exclusionary rule. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Coolidge v. New Hampshire*, 403 U.S. 443, 487-490 (1971). Even if the acceptance and inspection of an interstate shipment by the apparent addressee could be called a search or seizure (much less an unlawful one), those actions were taken by employees of L'Eggs Products. Employees of that firm picked up the shipment, opened all twelve cartons and viewed one film. The FBI was not even notified until after these events had occurred. L'Eggs Products then asked the FBI to take the shipment. Nor was receipt by the FBI of the twelve open cartons a seizure. See *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 487. As the Ninth Circuit has stated, "[a] consensual transfer is by definition not a seizure." *United States v. Sherwin*, 539 F. 2d 1, 7 (1976) (en banc).

Petitioners allege, however, that the decision below and the decision in *Sherwin* conflict with *United States v. Kelly*, 529 F. 2d 1365 (8th Cir. 1976), on the question whether the government must obtain a warrant prior to accepting from a common carrier materials that are arguably protected by the First Amendment. Although the court below correctly held (Pet. App. 8) that "*Kelly* conflicts with the reasoning implicit in a long line of private search decisions," the facts in *Kelly* are significantly different from this case. In *Kelly*, United Parcel Service notified the government that a package it was transporting was ripped open, revealing pornographic books and magazines. With the carrier's consent, the government

removed several samples from the open carton and the carrier shipped the remaining items to the intended recipient. Here, by contrast, L'Eggs Products took the cartons from the common carrier, inspected their contents and later turned them over to the FBI. Moreover, in this case petitioners themselves are largely responsible for whatever "search" and "seizure" resulted by addressing the shipment to a fictitious addressee under a name very similar to L'Eggs Products. In sum, although we believe that *Kelly* was wrongly decided, no conflict is squarely presented by this case.

The court of appeals was also correct (Pet. App. 9-12) in rejecting petitioners' further claim (No. 79-67 Pet. 23-31; No. 79-148 Pet. 9-10) that the subsequent viewing of the films by the FBI constituted a separate "search" for which a warrant was required. When the FBI received the materials, the shipping cartons were already open, exposing the individual film boxes, which proclaimed their contents with photographs and explicit descriptions of the conduct portrayed on each film. These explicit descriptions eliminated any reasonable expectation of privacy petitioners might otherwise have had in the contents of the films. See *Lewis v. United States*, 385 U.S. 206, 211 (1966).⁷

Moreover, the FBI agents viewed the films only after a L'Eggs Products employee had examined the films and had ascertained their apparently obscene nature. This fact distinguishes the present case from *United States v. Haes*, 551 F. 2d 767 (8th Cir. 1977), on which petitioners rely for an alleged conflict. In *Haes*, an air freight company

⁷These facts distinguish this case from *United States v. Chadwick*, 433 U.S. 1 (1977), on which petitioners rely. *Chadwick* involved the search of a locked footlocker that gave no surface indication of its contents.

(Emery) discovered that it was transporting a shipment of pornographic materials and called the FBI. Without releasing the materials, Emery permitted the FBI to view some of the films with the aid of a projector, although Emery had not attempted to view any of the films. The court held that the films should have been suppressed on this ground (551 F. 2d at 771-772; footnote omitted):

The further actions by the FBI in bringing a projector to the Emery offices and viewing the films by themselves, extending over a two hour period and without any further participation or prior viewing by Emery employees, changed the nature of the search. * * * We would feel otherwise if the private search had included any sort of viewing of the films and a determination of possible obscenity prior to turning the films over to the FBI.

Here, a L'Eggs Products employee viewed one film and determined the possible obscenity of the other films by reading their descriptions on the individual boxes, prior to turning the films over to the FBI. Cf. *United States v. Pryba*, 502 F. 2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975). On these facts, there is no reason to suppose that the Eighth Circuit in *Haes* would have disagreed with the Fifth Circuit here.

2. Petitioners also contend (No. 79-67 Pet. 29-31; No. 79-148 Pet. 7-8) that the retention of the films by the FBI until the date of trial without an adversary hearing or other judicial determination of obscenity required suppression of the films at trial. That contention is incorrect.

This Court has held that before the government can initially seize materials from their owner that are arguably protected by the First Amendment, the Fourth Amendment requires that it must obtain a judicial (but non-

adversary) determination of their probable obscenity; and before it can permanently restrain the publication of such materials (e.g., by destroying them), the First Amendment requires that it must provide the owner with an adversary hearing. See *Heller v. New York*, 413 U.S. 483, 488-493 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 501-506 (1973). The government did not violate those principles in this case.

First, there was no violation of Fourth Amendment requirements because the government did not seize the films from petitioners but simply accepted them from a willing third party. Such acceptance was not a Fourth Amendment seizure, and this Court has never suggested that the government must obtain a judicial determination of probable obscenity before accepting materials that are voluntary tendered to it.

If petitioners had sought the return of the films, they might have an argument that the government's continued retention required a judicial determination of probable obscenity. But they never made such a request until they filed their motion to suppress—21 months after the shipment—although the record establishes that they knew that the FBI had the films shortly after the shipment was misdelivered. The Fourth Amendment does not require the government to seek a judicial determination sua sponte and in the absence of any request by the owner in order to retain materials it has lawfully acquired. Cf. *Heller v. New York*, *supra*, 413 U.S. at 490.

There was also no violation of First Amendment principles in this case. As in *Heller v. New York*, *supra*, 413 U.S. at 490, the FBI's actions in this case did not constitute any form of "final restraint," but amounted at most to a temporary detention of the films in order to preserve them as evidence. Moreover, even if the length of

the detention could be regarded as a "form of censorship" (*ibid.*) that was impermissible in the absence of an adversary hearing,⁸ the proper remedy for such a First Amendment violation would be return of the films, not the suppression of evidence. See *Heller v. New York*, *supra*, 413 U.S. at 493 n.11; *United States v. Bush*, 582 F. 2d 1016, 1021 (5th Cir. 1978); *United States v. Womack*, 509 F. 2d 368, 382-383 n.48 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

3. The district court instructed the jury that obscenity is determined by the standards of the "average person of the community as a whole," whom the court described as a person having an "average and normal attitude toward, and an average interest in, sex" (Tr. XI 14-15; No. 79-67 Pet. App. 17). Petitioners contend (No. 79-67 Pet. 33-34; No. 79-148 Pet. 10) that the instruction should have stated specifically that the average person must be drawn from the "adult" community only. *Pinkus v. United States*, 436 U.S. 293 (1978), on which petitioners rely, does not require such an instruction. In *Pinkus* the district court specifically charged that "children" and the "young" were part of the community and this Court concluded that it was error to give such an instruction. See also, *United States v. Bush*, *supra*, 582 F. 2d at 1021. In the present case, children were never mentioned and, as the court of appeals correctly held, the jury "instruction adequately directed jury consideration to the contemporary [community] standards of adults * * *" (Pet. App. 17).

⁸Again, since petitioners never requested such a hearing, any conclusion that the length of the government's retention of these documents constituted a form of censorship would be unwarranted. *Heller v. New York*, *supra*, 413 U.S. at 490.

4. Petitioner Walter claims (No. 79-67 Pet. 31-32) that there was insufficient evidence that he knew of, participated in, or consented to the acts charged in the indictment. This claim is refuted by the record. As the court of appeals correctly summarized the evidence (Pet. App. 14-15), it showed that Walter and Sanders jointly owned and operated an extensive network of adult cinemas, bookstores, and distribution warehouses, including co-petitioners' Gulf Coast News Agency, Inc. and Trans World America; that Walter was active in directing the day-to-day operations of the business and was frequently seen on the premises of both Gulf Coast News Agency, Inc. (the shipper of the cartons of film) and Trans World America (the intended recipient); and that he told employees that Trans World America was being established to distribute sexually explicit materials. From this evidence the jury could conclude beyond a reasonable doubt that Walter knew of and participated in the acts and agreements charged in the indictment.⁹

5. Petitioner Walter argues (No. 79-67 Pet. 34-35) that the jury should have been instructed that the film had to appeal to the prurient interest only of homosexuals and not of the average person in the community, because the films were intended for a homosexual audience. No such instruction has been required by this Court's decisions, which have approved instructions which allow the jury to consider the prurient appeal of materials to either the "average person" or members of a deviant sexual group (see, e.g., *Pinkus v. United States*, *supra*, 436 U.S. at 301-303; *Hamling v. United States*, 418 U.S. 87, 128-130

⁹Petitioner Walter's apparent contention (No. 79-67 Pet. 32 n.7) that the government must prove that he knew that the films were legally obscene was rejected in *Hamling v. United States*, 418 U.S. 87, 123-124 (1974).

(1974); *Mishkin v. New York*, 383 U.S. 502, 505-509 (1966), and such an instruction was given here (XI Tr. 214-216). Indeed, the court even identified the deviant group as homosexuals (XI Tr. 216). The jury in this case must have found beyond a reasonable doubt that the films appealed to the prurient interest of either the average person or homosexuals. This is all that is required to satisfy the "prurient appeal" prong of the *Miller v. California*, 413 U.S. 15 (1973), three-part test for obscenity.

6. Petitioner Walter further contends (No. 79-67 Pet. 36) that one juror was inattentive during the screening of the films and therefore could not properly judge their literary, artistic, political or scientific value. The district court disagreed, "I don't think the situation is one of such inattentiveness as requires intervention by me at this time" (VIII Tr. D-125). The court of appeals also found the claim meritless (Pet. App. 17). There is no reason to disturb this finding of fact concurred in by both lower courts. See *Berenyi v. Immigration Director*, 385 U.S. 630, 636 (1967).

7. Petitioner Walter complains (No. 79-67 Pet. 37-38) that the district court did not examine the jurors enough on voir dire. The scope of the examination of jurors on voir dire is within the discretion of the trial court (*Smith v. United States*, 431 U.S. 291, 308 (1977)), and there was no abuse of that discretion here. While there would have been no error in asking the jurors how long they had resided in the community, such a question is not constitutionally required. In any event each juror had resided in the community at least one year, a time sufficient to provide familiarity with local standards (II Tr. Doc. 61 and 62). The trial court was not required to permit questioning on the juror's knowledge of homosexual conduct. Nor, as petitioner contends, can familiarity

with community standards be ascertained by determining whether a juror has been exposed to pornographic materials.

7. Petitioner Walter's claim (No. 79-67 Pet. 38-39) that he should have been granted a severance is insubstantial. He contends that had he been granted a severance, Michael Grassi would have testified in his behalf but would not do so in a joint trial because petitioner Sanders' attorney could impeach Grassi's testimony with past criminal offenses. But Walter had no right to have Grassi testify free from an attack on his credibility, which could have been impeached by the prosecutor in any event. Walter also alleges that hearsay statements of Sanders were admitted against him, yet he fails to document his claim. In these circumstances, the district court did not abuse its discretion when it denied Walter's motion to sever (See IX Tr. 119-121).¹⁰

¹⁰Petitioner Walter's final claim (No. 79-67 Pet. 39-40) is that the jury should have been instructed on his theory that, because each community contains men and women, the average member of the community is a "transsexual." This claim is frivolous.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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Supreme Court, U. S.
FILED
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IN THE
Supreme Court of the United States

October Term, 1979
No. 79-67

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

The United States, in its opposing brief in Nos. 79-67 and 79-148, has rewritten the trial transcript and misstated petitioner's issues to an extent beyond the scope of this reply. For the sake of clarification this limited response follows:

1. Respondent's brief in opposition suggests repeatedly that L'Eggs Products employees "viewed" or "examined" one of the 8-mm films prior to relinquishing them to the FBI (Br. in Opp. 6-8). The implication is that a film was either screened on a projector or held up to the light so the contents of some of its individual frames could be ascertained. In fact, no film was ever placed on a projector and the attempts by both the L'Eggs Products employees and the FBI agent to "eye view" the film failed because the film

frames were too small to be seen with the naked eye (see R.T. Vol. 1 Supp. at 65-119, 137, 155 and Vol. 7 at C-133 to C-137).¹ Accordingly, the nature and content of the subject films were unknown until they were screened approximately two months after the FBI appropriated them.

2. The conflict in the circuits over whether the government's acceptance of First Amendment materials uncovered by a common carrier during a private search constitutes a "seizure" requiring a warrant has already spawned a law review article on the subject. *Note, Private Searches and Seizures, United States v. Kelly and United States v. Sherwin*, 90 Harv. L. Rev. 463 (1976). Conceding this conflict, respondent somehow believes this case is factually distinguishable from *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976), since L'Eggs Products employees "inspected" the contents of the film boxes. As was pointed out *supra*, however, this inspection yielded no information regarding the content of the films which were too small to be viewed with the naked eye. Any distinction between the two cases is therefore illusory.

Respondent likewise attempts to distinguish the "secondary search" problem announced in *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977), by contending that only the FBI viewed the films in *Haes* but in the present case "a L'Eggs Products employee had

¹8-mm film is eight (8) millimeters in width. Excluding three (3) millimeters for sprocketing and one (1) millimeter for the border, the film is contained within a four (4) millimeter frame. This frame is less than 0.16 inch wide and the scenes depicted within the frame are necessarily much more minute. It is therefore understandable that such films cannot be examined with the naked eye.

examined the films and had ascertained their apparently obscene nature (Br. in Opp. 7)." In fact, the L'Eggs Products employees testified they did not know what was on the films. Also, it is irrelevant what these employees thought was obscene for to hold otherwise would authorize any third party to seize films, books and magazines. *A fortiori*, "[t]he two-month hiatus between the private search and the governmental screening negates any assumption that one continuous search took place. . . . If the descriptions on the box covers are an infallible guide to the contents of the films there would have been no need to retain the films for two months before making them available to the United States Attorney's office (Pet. App. 34-35 (Wisdom, J., dissenting))."

It is further suggested by respondent that *United States v. Chadwick*, 433 U.S. 1, has no applicability because the footlocker in *Chadwick* "gave no surface indication of its contents (Br. in Opp. 7 n. 7)." If probable cause to search an already seized container exists, however, a judicial warrant must first be obtained irrespective of "surface indications" of the container (Pet. App. 35-36 (Wisdom J., dissenting)). This is especially true of search warrants involving presumptively protected First Amendment films which must be "accorded the most scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485.

3. Although several lower courts have determined that the proper remedy for an unlawful prior restraint is return of the property, not suppression of evidence, all of those cases involved material taken under the authority of a warrant and held for but a brief period. No court has ever decided whether suppression is a proper remedy when First Amendment materials are

appropriated without benefit of a warrant and held for a lengthy period of time. Suppression would appear to be a constitutionally mandated remedy under such circumstances.

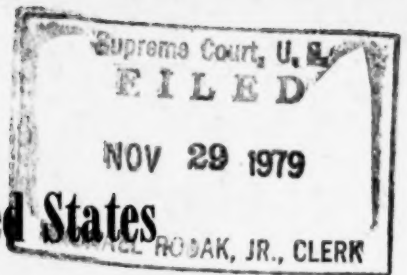
For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

IN THE
Supreme Court of the United States



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UNITED STATES OF AMERICA,

Respondent.

**Brief of Petitioner Walter on Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.**

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IN THE
Supreme Court of the United States

October Term, 1979
No. 79-67

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Brief of Petitioner Walter on Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit.**

Petitioner William Walter respectfully prays that the opinion and judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Opinions Below.

The 2-1 opinion of the Court of Appeals was filed on April 2, 1979, and appears as Appendix A to the petition. The decision is reported at 592 F.2d 788. A per curiam opinion, reported at 597 F.2d 63, which denied a petition for rehearing and petition for rehearing en banc yet discussed an issue previously asserted and not before commented upon by the court was entered on June 15, 1979 and appears as Appendix B to the petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 2, 1979, over the dissent of Circuit Judge Wisdom. Petitioner duly filed a petition for rehearing with suggestion for determination en banc, which petition was denied on June 15, 1979, after the court had been polled at the request of one of its members for an en banc hearing. A copy of the order denying said petition appears as Appendix B to the petition. Thereafter, petitioner filed a motion for stay of issuance of mandate pending petition for writ of certiorari to the United States Supreme Court, which motion was granted on June 22, 1979, provided a petition for writ of certiorari was filed in the clerk's office of this Court on or before July 15, 1979. A copy of the order staying issuance of the mandate is attached as Appendix C to the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). A timely petition for a writ of certiorari was duly filed on July 16, 1979, and on October 15, 1979, the petition was granted.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Fifth and Sixth Amendments to the Constitution, Title 18, United States Code §§ 2, 371, 1462 and 1465 and Rule 14, Federal Rules of Criminal Procedure, appear as Appendix D to the petition.

Questions Presented.

The petitioner was charged with conspiracy and aiding and abetting violations of the federal obscenity laws. Twelve sealed cartons containing 871 8mm films of male homosexual orientation were taken by a third

party from a common carrier and then, at the FBI's direction, held for five days before the FBI took delivery of them. FBI agents viewed the films two months later and two months after that turned the films over to the United States Attorney's Office. Over a year later an indictment was returned charging that five of the 25 titles of film were obscene. No search warrant was ever obtained, nor was there ever an adversary hearing. Trial evidence revealed petitioner was a business partner of a defendant shown to have authorized the shipment of film. Petitioner, however, was not shown to have ever seen the films in question or to have exercised any role in the business within two months either before or after the shipment. With the foregoing explanation, the questions presented are:

(1) Whether the FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in *Burdeau v. McDowell*, 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure"—that by the third party and that of the government—where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits.

(2) Whether the FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth Amendment as had been held in a similar case by the Eighth Circuit as well as a "search" within the teaching of *United States v. Chadwick*, 433 U.S. 1.

(3) Whether the Government by appropriating presumptively protected First Amendment material received

from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty for which is suppression of the material's use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(4) Whether in an obscenity prosecution *derivative* proof of scienter solely through evidence of petitioner's participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(5) Whether in an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the mores of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States*, 436 U.S. 293, that the community includes all adults who comprise it since "person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(6) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were

intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(7) Whether a juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be "*taken as a whole*" under the directive of *Miller v. California*, 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

(8) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States*, 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(9) Whether due process of law under the Fifth Amendment required that petitioner's case be severed

from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders.

(10) Whether the refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

Statement.

Petitioner appeals from a judgment of conviction rendered after a trial by jury before the Honorable Wm. Terrell Hodges, a judge of the United States District Court for the Middle District of Florida, Tampa Division, under an indictment charging both conspiracy to violate and aiding and abetting violations of Title 18, United States Code, Sections 1462 and 1465.

The indictment was returned in the United States District Court for the Middle District of Florida, Tampa Division, on April 6, 1977, and contained eleven counts charging petitioner and five others (two of whom were corporations) with violations of federal obscenity laws.

(C.T. Vol. 1, Doc. 1.)¹ Count One charged a conspiracy both to use a common carrier to transport obscene matter in interstate commerce and to transport obscene matter in interstate commerce for the purpose of sale or distribution. Counts Two, Four, Six, Eight and Ten charged the petitioner and others with aiding and abetting one another in using a common carrier to transport obscene matter in interstate commerce. Counts Three, Five, Seven, Nine and Eleven charged the petitioner and others with aiding and abetting one another in transporting obscene matter in interstate commerce for the purpose of sale or distribution.

A. Prior to trial petitioner filed a motion to suppress and return the subject films. (C.T. Vol. 1, Doc. 18.) In connection with the hearing of that motion the following facts were adduced:

On Thursday, September 25, 1975, twelve (12) sealed boxes containing 871 8mm films of homosexual orientation were shipped via Greyhound Package Express from St. Petersburg, Florida, to Atlanta, Georgia (R.T. Vol. 1 Supp. at 6.)² The shipment, directed to "Leggs, Inc." on a "Will Call" basis, was reforwarded to a Greyhound substation contrary to Greyhound's usual practice of holding "Will Call" items for pick up—whereupon L'Eggs Products, Inc. ("LPI") was contacted to pick up the package. (R.T. Vol. 1 Supp. at 20-21, 33-35.)

Michael Horton, Area Manager for LPI, drove to Greyhound to pick up the packages on Friday, Septem-

¹"C.T." refers to the Clerk's Transcript of the Record on Appeal, "Vol." refers to the Volume Number and "Doc." refers to the Document Number.

²"R.T." refers to the Reporter's Transcript of the Record on Appeal.

ber 26, 1975. Horton, accustomed to receiving only one or two boxes weighing but a few pounds, was surprised to see twelve unusually wrapped and reinforced boxes weighing hundreds of pounds. Since the boxes did not look "normal" to him, Horton pried one open and removed a box of film labeled "David's Boys." The box purported to describe its film contents. (The "David's Boys" series of films found in the shipped cartons consisted of 25 different titles of film of which 5 were charged in the indictment.) Horton then replaced the box of film, advised an employee at the Greyhound terminus that the shipment did not belong to LPI and left. (R.T. Vol. 1 Supp. at 56, 59, 61, 76-77, 81-82, 99.)

When Horton returned to LPI he advised his Branch Manager William Fox about the shipment. Fox immediately went to the Greyhound terminus, examined a box of film from the already opened package and concluded that the 12 cartons were not the property of LPI. Fox did not pay the collect charges on the packages since LPI had no interest in them, but he took the shipment back to LPI nonetheless. (R.T. Vol. 1 Supp. at 119, 121, 129, 131; Vol. 7 at C-146-47, C-150, C-178.)

At LPI, Horton, Fox, Gregory Shults (LPI's Southern Regional Distribution Manager) and others opened all twelve cartons and examined the boxes containing the David's Boys films. Shults removed an 8mm film from its case and held it up to the light, but the frames of the film were too small to be observed in this fashion. Thereafter, Horton telephoned the FBI and informed Special Agent Lawrence Mandyck of what had happened. Mandyck instructed him to put the boxes in a safe place "where nobody can bother them" and

that the FBI would pick them up. (R.T. Vol. 1 Supp. at 63, 65, 90, 107, 133, 143-44, 171.)

Five days later on Wednesday, October 1, 1975, Agent Mandyck passed by LPI to pick up the 871 boxes containing film. Mandyck conceded that the box cover description of the films may have been incorrect and that he caused no application to be made for a search warrant during the five day hiatus although he easily could have obtained a warrant. At LPI the container cartons were arranged so that only the white tops of the boxes of film could be seen without removing the individual boxes from their container. Mandyck or another FBI agent opened a film box and unsuccessfully sought to "eye view" the reel of film therein. (The evidence reflects that each boxed reel of film was sealed by a piece of tape to keep it from unraveling. Accordingly, before a reel of film could be viewed, the tape had to first be removed.) (R.T. Vol. 1 Supp. at 93, 116, 134, 171, 192, 195, 206.)

On Friday, September 26, 1975, co-defendant Michael Grassi called from Atlanta to ask co-defendant Richard Larson in St. Petersburg, Florida what had delayed the expected shipment of films from Larson. Larson reported that the films had been shipped to the Atlanta warehouse via Greyhound using the name "Leggs, Inc." as consignee—"Legs" being the nickname of a female employee in the Atlanta warehouse. In the past, shipments had been made and received using the name "Leggs, Inc." That same day Larson contacted Greyhound express clerk Joe Harris in St. Petersburg to report the non-receipt of the shipment and to initiate a tracer on the package. He left a name and telephone number. (R.T. Vol. 1 Supp. at 13-14; Vol. 4 Supp. at 5-6; Vol. 7 at C-25, C-29-31.)

Gregory Shults of LPI attempted unsuccessfully to find out the consignor's address since it was fictitious. (Several witnesses explained that a fictitious name on shipment bills of lading was employed to prevent common carrier pilferage which occurred when the name of a known adult business was used.) Shults also spoke to Griffin Askew, Assistant Terminal Manager for Greyhound in Atlanta, to advise him that LPI was turning the shipment over to the FBI and he gave Askew the local FBI telephone number. (R.T. Vol. 1 Supp. at 31, 35-36, 50, 150, 167, 228-29; Vol. 4 Supp. 5-6.)

The defendants made numerous attempts to retrieve their misdelivered shipment. Ronald Bowman was sent to the Greyhound station in St. Petersburg on Monday, September 29, 1975 to look for the packages. A girl named Joyce telephonically contacted Griffin Askew at Greyhound on three occasions attempting to recover the shipment. Askew, however, had been advised by the FBI not to provide any information about the shipment and to call them if contacted about the twelve boxes. Askew complied with these directives. Defendant Grassi went to the Greyhound station personally three times looking for the package, leaving his name and number. He also contacted LPI on Tuesday, September 30, 1975, and several times thereafter. LPI never admitted that they had the shipment. LPI's Fox apparently received two calls from someone trying to get the films back and specifically recalls speaking to Grassi but he believed their telephone conversation occurred about two weeks after LPI acquired the films. (R.T. Vol. 1 Supp. at 36, 50-52, 125; Vol. 4 Supp. at 6-10; Vol. 7 at C-30, C-138, C-147.)

Agent Mandyck did not review the films in the boxes he seized until December, 1975, even though he was aware the defendants were trying to get their merchandise back. It was not until February, 1976, that Mandyck through the filing of a report notified the United States Attorney's Office in Atlanta, Georgia, that he had the films in question. An adversary hearing to determine the obscenity *vel non* of the films was never conducted. (R.T. Vol. 1 Supp. at 192, 193, 208; Vol. 7 at C-163.)

The trial judge concluded that petitioner had standing to assert the motion to suppress and return. (See petitioner's testimony, R.T. Vol. 1 Supp. at 223-257.) The motion was denied, however, on the grounds that defendants did not have a reasonable expectation of privacy in the subject materials and "that there was a private search and no Government seizure within the meaning of the Fourth Amendment." (R.T. Vol. 4 at 109-10, 115-16.)

B. Preceding the trial, petitioner filed proposed *voir dire* questions with the court. (C.T. Vol. 2, Doc. 46.) Some of the proposed questions the judge refused to ask prospective jurors, in addition to their length of residency in the community, were:

"120. In this case you will be asked to view males engaging in homosexual sexual activity. Are you personally familiar with the attitudes and norms of the homosexual community?"

"122. Do you believe your experience is inadequate to judge the appeal of these films to homosexuals unless expert testimony is presented?"

"102. Do you feel the availability in the community of sexually explicit or graphic materials is on the increase or the decrease?"

"103. Does this fact disturb or offend you?"

"105. Have you ever known of anyone to have been harmed or hurt in any way by exposure to sexually explicit or graphic materials?"

"111. Will you be able to view films which depict certain sexually explicit activities, including mouth and genital contact, and intercourse, ejaculation, homosexual activity and interracial sex with open eyes and an open mind?"

"119. What organizations do you belong to in the community?"

C. Midway through the trial the five allegedly obscene films were projected for the jury. At the conclusion of the third film shown the jury, petitioner brought to the Court's attention that Juror Kohring was not viewing the films but had been reading a magazine during the screening. The judge directed him to put away the magazine. Thereafter, Kohring did not view much of the fourth film shown. At that time petitioner's counsel wrote a note to FBI Agent Hod Hunt asking him to observe whether Kohring was watching the fifth film during its screening. Mr. Hunt was instructed not to make this observation by Assistant United States Attorney John Lund and, accordingly, Hunt averted his eyes from the jury box during the showing of this final film. Again, Kohring did not view the screen for more than seconds at a time. (R.T. Vol. 8 at D-123 to D-129.) News personnel in attendance at the trial observed juror Kohring avert his eyes and so reported it. Moreover, Kohring, who wore glasses, put them on only for the purpose of reading and did not wear them for viewing the film. (R.T. Vol. 8 at D-124.) See Affidavit

of W. Michael Mayock and newspaper clippings and note to Hunt appended thereto. (C.T. Vol. 2, Doc. 51.)

Petitioner made a motion to replace Kohring with an alternate juror. The court rejected this request saying that although he had witnessed Kohring averting his eyes on a couple of occasions that Kohring had paid sufficient attention and further intimating that the jury would screen the films in the jury room during deliberations. (R.T. Vol. 8 at D-125.) Significantly, the jury had no projector in the jury room and so did not see the films again. (R.T. Vol. 11 at G-229.)

D. At the inception of the trial attorney Zell represented co-defendants Grassi and Sanders. Midway through the trial, Grassi, still represented by Zell, entered into a plea agreement with the prosecution on the condition that he testify for the prosecution at trial. Grassi thereafter obtained a new counsel, Hall, who advised him not to waive his attorney-client privilege with Zell since Hall had ascertained from Grassi that Zell could impeach Grassi with other crimes Grassi had confidentially communicated to Zell. At a hearing Grassi advised he would testify if Walter's case were severed from Sanders'. His testimony would have been exculpatory of Walter on the *scienter* issue in that petitioner did not knowingly transport the films by *common carrier* (R.T. Vol. 4 Supp. at 23) and did not know the "nature, character and contents" of the films. (R.T. Vol. 8 at D-10; Vol. 9 at E-3, E-5, E-9, E-117 to E-121.)

Petitioner was prejudiced not only in being tried with Sanders but with Sanders' lawyer as well. Zell was shown to have advised one witness, Maxey, to "take the Fifth" Amendment before the Grand Jury

(R.T. Vol. 9 at E-93 to E-94) and to have prepared Government's Exhibit 13 (Appendix E to the petition), a letter Zell wrote to an accountant attributing ownership of certain defendant corporations to defendants Grassi and Sanders which the Government contended was false. Petitioner sought unsuccessfully to have a hearing on Zell's obvious conflicts of interest one month in advance of trial. (C.T. Vol. 2, Doc. 39 at 2.)

E. Viewing the trial evidence in the light most favorable to the Government, there was evidence that petitioner and defendant Sanders were partners who jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses. Defendant Sanders and all other defendants, with the exception of petitioner, were shown to have authorized the shipment of 871 8mm films which culminated in the indictment at bar. There was no evidence that petitioner had ever seen these films or had any knowledge of their nature, character or contents. There was no evidence petitioner exercised any role in the business within either two months before or after the shipment of film. Finally, there was no evidence that any other shipment made by the business contained obscene material.

F. Petitioner proffered at least five jury instructions which sought to have the term "average person" in the obscenity formulation defined as "average adult." (C.T. Vol. 2, Doc. 45). For example, proposed instruction No. 22 read in pertinent part:

"The term 'average adult person' as used in these instructions is a hypothetical composite person who typifies the entire community including persons of both sexes

"'Adult' means all persons of age of 18 or older."

The trial judge refused to give a charge defining "person" as "adult." The court likewise declined petitioner's proffered instruction No. 48 that if "the jury is unable to ascertain the meaning of 'the average adult person,' or of 'contemporary community standards' . . . then the Government has failed to prove its case beyond a reasonable doubt." Petitioner had sought to develop on cross-examination of the Government's expert witness that certain terms used in the obscenity test, such as "the average person," were incapable of ascertainment. It was suggested that because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual.

Petitioner asked the court to give the following instruction:

"The predominant appeal to prurient interest is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group." (C.T. Vol. 2, Doc. 45, No. 28.)

Instead, the court delivered this charge:

"In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, *beyond a reasonable doubt*, that the material was intended to appeal to the prurient interest

of such a group as, for example, homosexuals.” (Emphasis added.) (R.T. Vol. 11 at G-215, G-216.)

G. Trial commenced on August 10, 1977, and on August 19, 1977, the jury rendered a verdict finding petitioner guilty on all eleven counts. (R.T. Vol. 11 at G-231.) On October 21, 1977, the Honorable Wm. Terrell Hodges, United States District Judge, after denying petitioner’s motions for a new trial and for judgment of acquittal, sentenced petitioner to concurrent three year terms of imprisonment on all counts. That same day petitioner filed a timely Notice of Appeal (C.T. Vol. 2, Doc. 59) and was allowed to remain on \$25,000 corporate surety bail pending the outcome of his appeal. Petitioner duly filed his appellate briefs in the Court of Appeals. The judgment of the District Court was affirmed on April 2, 1979. A timely petition for rehearing with suggestion for determination en banc was denied on June 15, 1979. An order staying the issuance of the mandate was granted on June 22, 1979, provided a petition for writ of certiorari was filed in the clerk’s office of this Court on or before July 15, 1979. A timely petition for a writ of certiorari was filed on July 16, 1979, and on October 15, 1979, the petition was granted.

Summary of the Argument.

The FBI’s acceptance from a third party of films wrongfully within that party’s possession was a “seizure” subject to the warrant requirement of the Fourth Amendment. Alternatively, the rule fashioned in *Burdeau v. McDowell*, 256 U.S. 465, fifty years ago requires a two-step analysis of the “seizure”—that by the third party and that of the government—where First Amendment concerns are involved as has been held by

the Eighth Circuit but not by the Fifth or Ninth Circuits. Developments in Fourth Amendment doctrine and expanding concepts of privacy have undercut the practical function of *Burdeau*. To hold otherwise would allow Government sanctioned private censorship without judicial supervision and present problems of prior restraint.

The FBI’s screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a “secondary search” subject to the warrant requirement of the Fourth Amendment as had been held in *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977) as well as a “search” within the teaching of *United States v. Chadwick*, 433 U.S. 1. The films could not be seen with the naked eye and gave no surface indication of their contents. Hence the viewing of the films was a “search.” Moreover, the two-month hiatus from the time the FBI acquired the films to the time it screened them was more egregious than the one-hour delay in conducting a search in *Chadwick*. Also *Chadwick* did not involve presumptively protected material.

The Government by appropriating presumptively protected First Amendment material received from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty for which is suppression of the material’s use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court. The Government violated its own directives regarding the seizure of press materials. The circumstances of

the seizure were shocking to the conscience and constituted a deliberate attempt permanently to remove press materials from the eye of the public.

In an obscenity prosecution derivative proof of scienter solely through evidence of petitioner's participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court. *Hamling v. United States*, 418 U.S. 87, 123 requires proof that a defendant knew "the contents, character and nature" of the subject films. Petitioner never saw the films and was not proved to have knowingly transported these films either interstate or by means of a common carrier.

In an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the mores of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States*, 436 U.S. 293, that the community includes all adults who comprise it since "person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution. Even if it could be said that the jury could have concluded that "person" meant "adult," it cannot be certain that this is what it did do since the verdict was a general one.

In an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court. Whether the maker of the films intended them to appeal to the prurient interest of homosexuals is not only irrelevant but impossible to ascertain. Also the consequence of requiring proof of intent beyond a reasonable doubt was to unconstitutionally shift the burden of persuasion to petitioner.

A juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be "*taken as a whole*" under the directive of *Miller v. California*, 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

In an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the

homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States*, 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

Due process of law under the Fifth Amendment required that petitioner's case be severed from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders. Additionally, Sanders was the subject of much adverse pretrial publicity and was represented by an attorney who had instructed a prosecution witness to "take the Fifth Amendment" and who wrote a letter which the Government introduced at trial and contended was false.

The refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court. At trial

during cross-examination even the prosecution expert conceded that the term "the average person" was confusing. Petitioner sought to show that because that term is framed in the singular and includes both men and women, then of necessity "the average person" must be a transsexual.

ARGUMENT.

I.

The FBI's Acceptance From a Third Party of Films Wrongfully Within That Party's Possession Was a "Seizure" Subject to the Warrant Requirement of the Fourth Amendment, or Alternatively, the Rule Fashioned in *Burdeau v. McDowell*, 256 U.S. 465, Fifty Years Ago Requires a Two-Step Analysis of the "Seizure"—That by the Third Party and That of the Government—Where First Amendment Concerns Are Involved as Has Been Held by the Eighth Circuit but Not by the Fifth or Ninth Circuits.

More than fifty years ago in *Burdeau v. McDowell*, 256 U.S. 465, 475, the Supreme Court held "that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure."³ However, when First Amendment concerns are at stake "the most scrupulous exactitude" must be given the constitutional requirements of the Fourth Amendment. *Stanford v. Texas*, 379 U.S. 476, 485. The First Amendment operates as an independent source of restrictions upon the power of the police to take expressive material since a prompt judicial determination in an adversary setting is mandated to obviate prior restraint problems. *Heller v. New York*, 413 U.S. 483, 495. Where, as here, the government acquires films which are the product of a third party search and fails to observe the minimum procedural safeguards prescribed by the Supreme Court the acquisition must be deemed a "sei-

³Dissenting opinion of Judge Wisdom at Pet. App. A-29.

zure" both because it is a deprivation of a legitimate property interest (See *Rakas v. Illinois*, 439 U.S. 128) and because it operates as a prior restraint which upsets reasonable expectations that the property would be subject to prompt judicial return (*Heller, supra*) or would remain private. In short, where First Amendment concerns are involved a two-step analysis of the "seizure" must be made—that by the third party and that of the government—and *Burdeau* applies only in the absence of an independent governmental invasion of privacy rights protected by the Fourth Amendment. The majority opinion of the Circuit panel failed to discuss this issue.

As Judge Wisdom's dissent incisively demonstrated, the *Burdeau* rule is an anachronism discredited by commentators.⁴ Its functional twin the "silver platter" doctrine was discarded nearly twenty years ago. *Elkins v. United States*, 365 U.S. 206. Developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau* which was decided when there were few justifications for warrantless seizures. Today our society is expanding, not contracting, its legitimate expectations of privacy. Although *Rakas v. Illinois*, 439 U.S. 128, disapproves "arcane distinctions developed in property . . . law," under *Burdeau* a "seizure" is determined by the *status* of the trespasser—official versus private. It is difficult, if not impossible, to

⁴See, e.g., Note, *Private Searches and Seizures*, 90 Harv. L. Rev. 463 (1976); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 Va. L. Rev. 1314, 1336-59 (1969); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 Stan. L. Rev. 608 (1967). *Burdeau* has also been criticized by some state tribunals. See, e.g., *State v. Helfrich*, Mont. , 26 Cr. L. 2092 (1979), citing *State v. Brecht*, 485 P.2d 47 (1971); *Williams v. Williams*, 8 Ohio Misc. 156, 221 N.E.2d 622 (1966).

reconcile *Burdeau* with *Shelley v. Kraemer*, 344 U.S. 1 (1948) which held the "state action" doctrine forbids judicial support of certain private acts which, if carried out by the government would be unconstitutional. In sum, some flexibility in *Burdeau* is required to accommodate reasonable modern expectations of privacy, particularly where they intersect First Amendment values.

The Eighth Circuit in *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976) concluded that where a common carrier delivers to the government First Amendment materials uncovered during a private search, the government's acceptance of said items constitutes a "seizure" requiring a warrant. The majority of the panel refused to follow *Kelly* and instead erroneously followed *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) which concluded under similar facts that there was no "seizure." The brilliant dissenting opinion of Judge Wisdom and Note, *Private Searches and Seizures, United States v. Kelly and United States v. Sherwin*, 90 Harv. L. Rev. 463 (1976) both comprehensively analyze these two cases and conclude without reservation that the approach of *Kelly* is preferable to that of *Sherwin* in accommodating both First Amendment rights and the privacy interests of absent third parties.

A. Every action undertaken by the shippers of the films was consistent with an expectation of privacy. The twelve boxes of film were double-wrapped and reinforced to prevent accidental breakage while in transit. *Previous shipments* of film directed to "Leggs, Inc." on a "Will Call" basis *had not been reforwarded* to a Greyhound substation and *L'Eggs Products, Inc. had not been contacted*. It was reasonable to expect that no one would both claim shipped packages which did

not belong to them and then pay the collect charges on those items. Moreover, it was reasonable to assume that Greyhound would not release the shipped cartons to someone who claimed no interest in them and refused to pay the collect shipping charges due. The employment of a fictitious name on the shipment bills of lading was an earnest attempt to ensure privacy since common carrier pilferage or breakage occurs frequently, as several witnesses testified, when the name of a known adult entertainment business is used on the bill of lading.⁵ Also the assiduous attempts of the shippers to locate their misdirected shipment is demonstrative of their expectation that the merchandise would remain private. Finally, where the "contraband" involved is 8mm films—the indictment did not charge the film box covers with being obscene—the expectation of privacy is at its greatest since (1) the films are presumed legitimate in the absence of a judicial determination to the contrary and (2) *the film frames are too small to be seen without the aid of a projector*. *Roaden v. Kentucky*, 413 U.S. 496; *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636. In fact, the FBI chose not to screen the films for *two months* after their seizure, although they knew appellants were seeking to retrieve their merchandise and even then maintained a reasonable expectation that the films would remain private and would not be viewed by others. See *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977); *United States v. Kelly*, 529 F.2d 1365, 1368 (8th Cir. 1976).

⁵Within a two month period one adult bookstore had *seven* separate interstate shipments addressed to it as consignee rip open "inadvertently." *United States v. Kelly*, 529 F.2d 1365, 1368 (8th Cir. 1976).

B. The government, relying heavily on *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) has contended that its acquisition of the films in issue did not fall within the scope of the Fourth Amendment since there is no "seizure" if property is consensually transferred by a third party to the government. Alternatively, the government advanced the third party consent exemption to the warrant requirement of the Fourth Amendment as justification for its seizure of the films. Neither theory has factual underpinning.

Admittedly, employees of L'Eggs Products, Inc. (LPI) voluntarily contacted the FBI to inquire as to what they should do with the misdirected shipment of films in their possession. FBI Agent Mandyck, knowing the shipment was "misdirected" and, accordingly, not rightfully within the possession of LPI, instructed LPI to secure the films in a safe place until the FBI could come by and pick them up. (R.T. Vol. 1 Supp. at 170-71, 107, 133.) However, a "seizure" is not complete until there is an effective appropriation (*Lustig v. United States*, 338 U.S. 74, 78) and the FBI waited five days to appropriate the films. During this hiatus, LPI denied having the films to defendant Grassi, thereby demonstrating their subservience to the government. (R.T. Vol. 4 Supp. at 8-9.) Also Greyhound employee Askew testified he did not tell defendants the whereabouts of the films *per FBI instructions* and Agent Mandyck admitted telling Askew to get the names and phone numbers of those seeking to retrieve the films. (R.T. Vol. 1 Supp. at 50-52, 207-08.) The only rational conclusion that may be drawn from the aforesaid facts is that LPI and Greyhound employees were not acting voluntarily but rather

under the command and at the direction of the FBI and that the FBI, knowing the films were wrongfully acquired by LPI, participated in and encouraged their theft. It is only "[w]here no official of the federal government has any connection with a wrongful seizure or any knowledge of it until after the fact, [that] evidence is admissible." *United States v. Mekjian*, 505 F.2d 1320 at 1327 (5th Cir. 1975). Thus, there was neither a voluntary relinquishment of the films to the FBI nor was there an absence of governmental participation in an illegal seizure.

The government's suggestion that the FBI acquired the subject films pursuant to a valid third party consent is unsupportable. LPI employees admitted LPI had no entitlement to the packages, the films were taken without paying the freight charges and the cartons were not addressed to LPI. Moreover, Agent Mandyck knew the films were "misdelivered" and retained for five days by LPI while the defendants sought to regain their merchandise. Obviously, the actions of defendants in attempting to retrieve their films were indicative of the fact that *no consent* had been given to LPI to relinquish the films to the FBI. Indeed, if LPI had authority over the films it was clearly lost during the five day interval between the time the FBI was contacted and the time it picked up the films.

C. The majority opinion claims that the acquisition of the twelve cartons of film by the FBI from LPI was not a "seizure" under the holding of *Sherwin*, *supra*, since it was the product of a voluntary relinquishment. This holding of *Sherwin* is not without detractors. *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc); *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976); *United States v.*

Haes, 551 F.2d 767 (8th Cir. 1977); *Private Searches and Seizures: United States v. Kelly and United States v. Sherwin*, 90 Harv. L. Rev. 463 (1976).

"Placing the Government's acceptance of printed materials outside Fourth Amendment constraints allows for the possibility of Government sanctioned private censorship without judicial supervision," "might deter the dissemination of legitimate expression via interstate common carriers," and "presents a problem of prior restraint." 90 Harv. L. Rev. at 467. All of the concerns expressed above were set in motion in the case at bar when LPI turned over to the FBI the cartons of film it wrongfully withheld from defendants. "Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." *McSurely v. McClellan*, 553 F.2d 1277, 1291 (D.C. Cir. 1976) (en banc).

The Harvard Law Review article in finding the approach of *Kelly* preferable to that of *Sherwin* criticizes the absolutist scope of the *Burdeau v. McDowell* exemption, concluding that developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau*. Furthermore, the article characterizes the government's conduct in *Kelly* and *Sherwin* as a "seizure" because it constituted a deprivation of the defendants' property interests. These property interests help define the scope of the right to privacy and must be presumed legitimate where First Amendment material is involved. Accordingly, the government's appropriations in *Kelly*, *Sherwin* and the case at bar were "seizures." 90 Harv. L. Rev. at 467-72.

II.

The FBI's Screening After a Two-Month Hiatus of Films Received From a Third Party Who Had Not Viewed the Films Constituted Both a "Secondary Search" Subject to the Warrant Requirement of the Fourth Amendment as Had Been Held in a Similar Case by the Eighth Circuit as Well as a "Search" Within the Teaching of *United States v. Chadwick*, 433 U.S. 1.

After obtaining the subject 8mm films from L'Eggs Products, the FBI waited two months to screen the films to ascertain what they had. The individual frames of 8mm film were too small to be seen with the naked eye. Although the box covers for the films purported to describe in graphic fashion the content of the respective films, the box covers were entitled to a presumption of non-obscenity (*Roaden v. Kentucky*, 413 U.S. 496), were never charged as being obscene and, moreover, did not present probable cause for the issuance of a warrant. *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977).

In *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977), the FBI, having been contacted by a common carrier who had discovered sexually explicit films and having brought a projector to the common carrier's office where they screened the films without first obtaining a warrant, was held to have conducted a separate, independent search which was illegal since no exception to the warrant requirement existed. The majority opinion of the panel purports to distinguish *Haes* by declaring that L'Eggs employees had fully ascertained the nature of the films even though they had never screened them. Therefore, the majority concludes, "the FBI's subsequent viewing of the movies on a projector did

not 'change the nature of the search' and was not an additional search subject of the warrant requirement." It is obvious that the FBI both changed the nature of the search and conducted an additional search when they projected films that had never been viewed by L'Eggs employees. *A fortiori*, the two-month hiatus between acquisition and screening negated the possibility that one continuous search transpired.

The majority opinion also attempts to distinguish *United States v. Chadwick*, 433 U.S. 1 (1977) by declaring that "the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant." This argument is flawed for the same reasons set forth above. Moreover, this interpretation of *Chadwick* would emasculate the decision. In *Chadwick* a *one-hour* delay in conducting a warrantless search of a footlocker for drugs was held to be too long. *Cf. Arkansas v. Sanders*, U.S., 99 S.Ct. 2586. How can it possibly be said that a *two month* delay in conducting a warrantless search of presumptively protected First Amendment material was not too long?

A. Assuming, *arguendo*, that LPI validly consented to the FBI's *seizure* of the subject films, there was no consent to the FBI's *search* of the films which occurred when they were screened two months later. Neither the FBI nor anyone at LPI knew the contents of the films since the 8mm film frames were too small to be seen with the naked eye (see R.T. Vol. 1 Supp. at 65, 119, 137, 155 and Vol. 7 at C-133 to C-137).⁶ Accordingly, the nature and content of the

⁶8mm film is eight (8) millimeters in width. Excluding three (3) millimeters for sprocketing and one (1) millimeter for the border, the film is contained within a four (4) millimeter

subject films were unknown until they were screened approximately two months after the FBI appropriated them.

In addition to not being charged as being obscene, the film box covers did not present probable cause for one to entertain the belief that the films were obscene. *United States v. Tupler*, 564 F.2d 1294, 1297-98 (9th Cir. 1977). However, during the two-month period prior to the screening of the films the FBI was cognizant that defendants were seeking the return of their films. Accordingly, any *imputed* consent must be deemed *revoked*. *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977) (taxpayer who consented to IRS possession of his papers for examination may withdraw his consent and reinvoke his Fourth Amendment rights as to all papers not then viewed or copied). Employing the logic of *Mason* to the case at bar it is clear the FBI viewed the films without the petitioners' consent and that search is properly a subject of suppression.

B. If the government undertakes any new or different searches after being apprised that contraband has been unearthed in a private search, then a warrant is required unless an exception to the warrant requirement exists. *United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977).

The opening of the film boxes by FBI agents and their unsuccessful attempt to "eye view" the contents of one of the 871 films at LPI places the government outside the scope of *Sherwin*, since there "[w]hen the agents arrived they did not conduct a more extensive search." *Sherwin, supra*, at 6-7. There is only *one*

frame. This frame is less than 0.16 inch wide and the scenes depicted within the frame are necessarily much more minute. It is therefore understandable that such films cannot be examined with the naked eye.

chance in 871 that the FBI did not conduct a more extensive search. Those are the odds against the FBI selecting the same film to "eye view" as did LPI employee Shults. Moreover, only five of the 25 different film titles were charged with being obscene. There was only a 20 percent chance that a charged film was "eye viewed."

C. The FBI's subsequent screening of films it received from LPI constituted a "search" prohibited in the absence of a warrant by the Fourth Amendment. Common sense dictates that this be so. Until the films were projected on a screen there was *no probable cause* to believe a crime had been committed,⁷ so how could the viewing of the films not be a "search"?

In both *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) and *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976) FBI agents simply reinspected magazines and books which had already been examined by freight agents. Significantly, in the case at bar the film box covers were not charged with being obscene and the film could not be "eye viewed." Therefore the FBI, unlike the situation in *Sherwin* and *Kelly*, was unable to judge the material either taken as a whole or at all for that matter. In screening the films the FBI engaged in a secondary search similar to the one condemned in *United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977). If anything, however, the instant search was more unreasonable since the Government never attempted to obtain

⁷The box covers for the film were entitled to a presumption of non-obscenity (*Roaden v. Kentucky*, 413 U.S. 496), were not charged as being obscene and did not present probable cause for the issuance of a warrant. (*United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977).) The film itself could not be seen with the naked eye.

a warrant, conceded there were no exigent circumstances, held the films for two months before viewing them and confessed that a warrant could have been obtained had one been sought.

Even if *Sherwin* is accepted as the controlling authority on the "seizure" issue, it does not mean the FBI's subsequent screening of the films was not a "search" governed by the Fourth Amendment. More exacting standards apply to searches and seizures of First Amendment-protected materials than to narcotics, gambling paraphernalia and other contraband. *Roaden v. Kentucky* 413 U.S. 496; *Stanford v. Texas*, 379 U.S. 476; *A Quantity of Books v. Kansas*, 378 U.S. 205. Also Fourth Amendment "search" and "seizure" issues are appropriately subjected to bifurcation. For example, in *United States v. Chadwick*, 433 U.S. 1 government agents had probable cause to believe defendants' footlocker contained contraband and, accordingly, they seized it at the time they arrested the defendants, but delayed their search of the luggage for *one hour* after the seizure. Since the police seizure was incident to an arrest it was exempt from the Fourth Amendment warrant requirement. The delayed warrantless search of the footlocker, however, did not fall within the compass of any recognized exception to the warrant requirement and was held constitutionally defective.

The lesson of *Chadwick* is instructive in the instant case. A sealed box of film is like a sealed trunk. It is immaterial that a Government acquisition be deemed a voluntary relinquishment or a consent seizure or a seizure incident to arrest, in all cases a warrant to seize is not mandated. But a warrantless search of the acquired items which contain potential contra-

band may not be delayed unless a search warrant is first obtained. In postponing their search of the subject films for two months, the FBI lost any possible exemption from the search warrant requirement of the Fourth Amendment it might have asserted. Therefore the search was illegal.

III.

The Government by Appropriating Presumptively Protected First Amendment Material Received From a Third Party for One and One-Half Years Without Requesting a Judicial Determination of the Obscenity Vel Non of Said Material Committed a Prior Restraint the Penalty for Which Is Suppression of the Materials' Use in a Criminal Trial in Accordance With the Provisions of the First, Fourth and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

Since 1931 when in *Near v. Minnesota*, 283 U.S. 697, this Court first undertook to clarify the doctrine of prior restraint and made it a touchstone of the First Amendment, this Court has reaffirmed and explained the doctrine in a plethora of cases that restrict the Government's possession of another's First Amendment materials to situations where a prompt adversary hearing is available so that prior restraint will not occur. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546; *Roaden v. Kentucky*, 413 U.S. 496; *Heller v. New York*, 413 U.S. 483; *Blount v. Rizzi*, 400 U.S. 410; *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636; *Freedman v. Maryland*, 380 U.S. 51; *Stanford v. Texas*, 379 U.S. 476; *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717; *Speiser v. Randall*, 357 U.S. 513. The chilling effect exerted by a prior restraint of expressive

material was amply discussed in these cases and does not require reiteration here. What must be addressed, however, is whether, in the absence of a Fourth Amendment violation, the violation of the First Amendment prior restraint doctrine requires at least under some circumstances the exclusion of the appropriated expressive materials from evidence in an attendant criminal trial. Although this question before now has never been considered, its answer must be in the affirmative to avoid a total abridgement of the First Amendment.

The Department of Justice long has recognized the potential for exclusion of evidence under the doctrine of prior restraint where there is a seizure of more than a representative sample of suspect material. In their "Handbook for Federal Obscenity Prosecutions," published by its Administrative Regulations Section of the Criminal Division, in June, 1972, it is stated:

"That is to say, if the defendant has 5,000 copies and we seize 10 for evidentiary purposes, the rule of reason would seem to have been met. If, however, he has 11 copies and we seize 10 perhaps we would be open to criticism. Thus, any seizure of presumptively protected materials in the absence of an adversary hearing, should be limited to the smallest possible number for use as criminal evidence, but probably in no case should the number exceed 8 or 10. We must at all times maintain the position that it is *evidence* we are seeking to obtain, and not solely the *destruction* of the books as our ultimate objective.

"The foregoing general policy statement would thus be applicable in situations involving in transit breakage of parcels containing obscene materials,

whether such breakage occurred during the course of transmission by a common carrier or in the United States mail stream. If the rule of reason is followed, the seizure would probably be sustained." (C.T. Vol. 1, Doc. 18 at 11-12.)

Although the Government directive speaks of a "rule of reason", it obviously was not followed since the seizure herein was massive and the holding period was one and one-half years. If "(t)he primary justification for the exclusionary rule is the deterrence of police conduct,"⁸ then surely the Government's own promulgation offered *no* deterrence to such conduct. Something more is obviously required, something with teeth to guard against wholesale disregard of First Amendment rights. What is called for is an exclusionary rule which balances the individual's and the public's interest in the expressive material against governmental concerns. Obviously, factors such as the length of time the material is withheld from the public, the nature of the appropriation, whether the victim of the seizure was given notice,⁹ and others will be significant.

⁸*Stone v. Powell*, 428 U.S. 465, 486; Cf. Thomas S. Schrock and Robert C. Welsh, "Up From Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251 (1974).

⁹*Fuentes v. Shevin*, 407 U.S. 67, summarizes the essence of procedural due process. The Court said:

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* at 80.

Moreover, an individual should have a duty to demand the return of his property only when it was seized pursuant to warrant since under those circumstances the judicial process

The idea underlying the development of an exclusionary rule in the area of First Amendment evidence is not novel, but it is necessary. See Peter E. Quint, "Toward First Amendment Limitations on the Introduction of Evidence: The Problem of *United States v. Rosenberg*," 86 Yale L.J. 1622 (1977); Henry P. Monaghan, "First Amendment 'Due Process,'" 83 Harv. L. Rev. 518 (1970).

In its second opinion filed June 15, 1979, the majority of the panel cite a number of lower court decisions which hold that when materials are seized in violation of the First Amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial. The cases cited involve the seizure, for but a brief period, of expressive matter pursuant to warrant but without an adversary hearing. Clearly the case at bar is distinguishable from these cases not only in that no warrant was involved but also importantly, in that the government held the appropriated materials for one and one-half years before an indictment was returned. In footnote seven of his dissent Judge Wisdom suggests that "*Heller and Roaden* may obliterate any distinction between violations of the First and Fourth Amendments when a seizure of expressive matter is defective for lack of a determination of probable obscenity by a neutral magistrate."

It also appears that no court has ever considered whether suppression of evidence is an appropriate remedy for a prior restraint under the Due Process Clause of the Fifth Amendment. Yet this Court in *United*

is involved. When there has been a warrantless seizure of expressive material such as in the case at bar, the judicial process has not been involved and it would stretch the First Amendment beyond the breaking point to require the aggrieved party to be the one required to seek a hearing.

States v. Russell, 411 U.S. 423, 431-32, stated, "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf. Rochin v. California*, 342 U.S. 165 (1952). . . ." It is submitted that the massive nature of the seizure herein (871 films were taken), the fact only five of the twenty-five film titles were ever charged with being obscene, the government's knowledge that defendants were seeking return of their property, the failure of the government to give either direct notice to petitioner that it had his property if he wished to claim it or to place a notice of seizure in a newspaper of general circulation (*cf. Sniadach v. Family Finance Corporation*, 395 U.S. 337; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306), and the government's failure to seek an obscenity *vel non* determination from a neutral magistrate during a two-year period manifest the government's intention to impose nonjudicial suppression of a citizen's presumptively protected First Amendment property without affording the citizen the niceties of procedural due process. The result, particularly when coupled with First and Fourth Amendment considerations earlier addressed, is shocking to the conscience and in violation of due process under the Fifth Amendment. The suppression of the appropriated films as evidence is a just and proper remedy under the circumstances of this case.

IV.

In an Obscenity Prosecution Derivative Proof of Scienter Solely Through Evidence of Petitioner's Participation in a Management Role in a Presumptively Legal Business Venture Which Shipped Numerous Films, and Without Any Further Proof That He Knew of or Authorized the Solitary Shipment of Films Charged as Being Obscene, Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

The Fifth Circuit's opinion concludes that "[g]iven the . . . testimony describing Walter's central role in the management of . . . companies involved in the distribution and sale of hardcore pornography, . . . he possessed the requisite scienter (Pet. App. A-15)."¹⁰ The Circuit thus erroneously equates an individual's *agreement* to participate in a presumptively legal business venture with guilty *knowledge* of a solitary criminal violation occurring in the course of the operation of that business by others. "In general an individual defendant may be criminally liable on the basis of an act or omission of another person, only if it appears beyond reasonable doubt that he willfully ordered or directed, or willfully authorized or consented to, *the act or omission in question.*" Devitt & Blackmar, *Federal Jury Practice and Instructions*, Vol. 1, Section 12.09 (1977) (Emphasis added). There is *no* evidence that petitioner ordered, directed, authorized or consent-

¹⁰Although the evidence demonstrated that petitioner Walter had a central role in the management of some companies which dealt in adult material, his role in the management of the two corporations charged in the indictment is not nearly as clear as the Court of Appeals would paint it. See, *e.g.*, Motion for Judgment of Acquittal (C.T. Vol. 2, Doc. 50 at 17-21).

ed to "the act in question" (the September 25, 1975, interstate shipment of allegedly obscene films) since all evidence touching upon him dealt with time frames either *two months before or two months after* the shipment date. Instead the evidence shows other defendants directed the shipment in question.

The evidence at trial and as recounted in the panel's opinion shows at most petitioner's involvement in a legal enterprise which dealt in all situations except the one at bar in material presumptively protected by the First Amendment.¹¹ *Roaden v. Kentucky*, 413 U.S. 496. It strains credulity to suggest this evidence and nothing more proved beyond a reasonable doubt that on September 25, 1975, petitioner: (1) Knew "the contents, character and nature" of the subject films he was never shown to have seen (*Hamling v. United States*, 418 U.S. 87, 123); (2) Knowingly used a common carrier to ship these obscene materials

¹¹It is patent that in calculating whether obscenity exists the material must be taken as a whole (*Miller v. California*, 413 U.S. 15) and an individual's subjective belief in the obscenity of material is irrelevant. *Clicque v. United States*, 514 F.2d 923 (5th Cir. 1975). The recitation of testimony relating to the contents of warehouses and bookstores is irrelevant since such material cannot be seen as a whole (*United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977)), nor can it be known to have traveled in interstate commerce at the direction of petitioner herein, nor can it be known whether said material is hard-core or soft-core. Indeed, under the law it must be presumed that such material is *not* obscene. *Roaden v. Kentucky*, 413 U.S. 496. Accordingly, there can be *no conspiracy with regard to such material not before the court* since a conspiracy involves an agreement to commit an illegal act, and there is nothing illegal about material presumptively protected by the First Amendment. Therefore, the conspiracy charge as to petitioner (and, of course, as to the other defendants) rises or falls on whether he (or they) can be tied to the September 25, 1975, shipment of twelve cartons of films, which is the only "object" of the conspiracy it is permissible to consider.

interstate; and (3) Knowingly transported these obscene materials interstate for the purpose of sale or distribution. The panel's determination that scienter in First Amendment cases may be proved derivatively by a pattern of non-criminal activity removed in time from the incident charged vitiates the scienter requirement spelled out by this Court. *Hamling, supra*; *Smith v. California*, 361 U.S. 147 (1959).

As *Hamling* elucidates, the scienter element in an obscenity prosecution requires proof beyond a reasonable doubt that a defendant had knowledge of "the contents, character and nature" of the charged material. In an attempt to skirt the mandate of *Hamling*, the Fifth Circuit, however, adopts by implication and without explication what appears to be both an analogue and an extension of what has been called the "willful blindness" exception to proof of knowledge.¹² Under the "willful blindness" concept a defendant's deliberate avoidance of learning the true criminal situation is presumed to be equivalent to knowledge when it is coupled with subjective awareness of the high probability of the fact in question.¹³ The Fifth Circuit has

¹²The origin of "willful blindness" concept may be traced to the English case *R. v. Sleep*, 169 Eng. Rep. 1296, 1302 (C.C.R. 1861), although the term did not spring into usage until substantially later. See, e.g., G. Williams, *Criminal Law*, Section 41, at 125 (1953). More recently, the concept has been found in our jurisprudence, principally in the arena of drug-related cases. See, e.g., *United States v. Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977); *United States v. Murrieta-Bejarano*, 552 F.2d 1323 (9th Cir. 1977).

¹³The concept of "willful blindness" has been attacked justifiably by commentators as a retrenchment from the requirement of *In re Winship*, 397 U.S. 358, 364, that the Government prove guilt beyond a reasonable doubt by demonstrating beyond reasonable doubt *all* elements of the charge. See, e.g., Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 Iowa L. Rev. 466 (1977). The "willful blind-

(This footnote is continued on next page)

taken the concept a step farther by finding knowledge in the absence of a showing of deliberate avoidance. In fact the record is devoid of evidence that petitioner Walter either saw the films or deliberately avoided seeing them. Also he neither knew nor deliberately avoided knowing the films were to be transported not only in interstate commerce but also by a common carrier. Equally significant is the Circuit panel's implicit finding in the face of a silent record that petitioner possessed a subjective awareness of the high probability that the films were obscene. Even had petitioner Walter seen the films, under Fifth Circuit authority an individual's subjective belief that material is obscene is irrelevant. *Clicque v. United States*, 514 F.2d 923 (5th Cir. 1975). Unlike gambling paraphernalia, drugs and other contraband, First Amendment materials are not amenable to the "subjective awareness" requirement of the "willful blindness" rationale.¹⁴ Unlike ordinary contraband, unviewed films must be presumed non-obscene. *Roaden v. Kentucky*, 413 U.S. 496.

In sum, the evidence at best demonstrates petitioner participated in a management role in a presumptively legal business venture which shipped numerous films. There was no evidence, however, of any involvement by petitioner in that business during the two months before and the two months subsequent to the solitary

ness" concept violates the rules of strict construction of a criminal statute, permits the courts to invade the province of the legislative body by redefining an element of a crime and violates the established principles governing the application of presumptions. *Id.* at 466-85.

¹⁴If anything, the specific intent element in obscenity prosecutions should be judged *strictissimi juris*. *Noto v. United States*, 367 U.S. 290, 299-300, *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961). See *Scales v. United States*, 367 U.S. 203, 232.

shipment of films charged as being obscene. Based upon such evidence, it is impossible to believe "any rational trier of fact could have found the essential elements of [scienter] beyond a reasonable doubt." *Jackson v. Virginia*, U.S., 99 S.Ct. 2781, 2789.

V.

In an Obscenity Prosecution the Refusal of the District Court to Instruct the Jury That in Calculating the Mores of the Community the Term "Average Person" Means "Average Adult" Violated the Teaching of *Pinkus v. United States*, 436 U.S. 293, That the Community Includes All Adults Who Comprise It Since "Person" Subsumes the Class "Children" and the Instruction Therefore Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution.

Petitioner submitted as least five jury instructions seeking to have the court define "average person" as meaning "average adult." (See appendix and *supra*, at 14-15.) *Pinkus v. United States*, 436 U.S. 293 said the community includes all adults who comprise it and "it was error to instruct the jury that [children] were a part of the relevant community." By failing to instruct the jury to consider only "adults" in calculating the composition of the contemporary community, the trial judge left open for the jury's speculation whether "person" included "children."¹⁵ Moreover, certain jurors

¹⁵As used herein, the word "children" includes the entirety of the class of "pre-adult" persons. It is recognized that certain teenagers in one state may be classified by state law as adults while their counterparts in another state are not. This does not pose a problem since *Miller v. California*, 413 U.S. 15, determined that the contemporary community is a "local" one and therefore application of the local law regarding the age of majority is appropriate.

apparently believed minors were part of the relevant community. During *voir dire* one juror declared:

"I have two teenage children coming up and they are faced with this type of thing on the streets every day. And it's . . . it's . . . to me very distasteful. And . . ." (R.T. Vol. 5 at A-85).

Subsequent attempts by the petitioner during *voir dire* to have the veniremen instructed that children were not involved in the case and that the material was not distributed to minors were rebuffed. (R.T. Vol. 5 at A-123, A-124.) Additionally, the court refused to ask the jury panel proffered *voir dire* questions on the point.¹⁶

Anyone who understands the English language recognizes that "children" are subsumed within the class "person." Accordingly, if the jury failed to include children as part of the contemporary community, they would have to have disobeyed the court's instructions. It is more likely than not that the jury followed the trial judge's directives. In doing so they necessarily considered "children" as part of the relevant community and thereby rendered a verdict which must be struck down for the reasons set forth by this Court in *Pinkus*.

The Circuit panel's opinion quotes from instructions using the words "average person" and "average and

¹⁶Two examples are as follows:

"If the Court should advise you that the challenged materials must be measured by their impact on the average person and not by their impact on minors or young persons or particularly susceptible persons, would you be willing and able to follow the Court's instruction in that regard (C.T. Vol. 2, Doc. 46 at 11, No. 83)?" and

"Do you presently have an opinion as to what materials adults should be allowed to see and read (C.T. Vol. 2, Doc. 46 at 15, No. 116)?"

normal attitude toward, and an average interest in, sex" and contends that these words limited consideration to adults. Pet. App. A-17. That is not the case, however. Taken in context what the quoted instructions did was to differentiate the non-deviant community from the deviant community. Moreover, even if the panel's viewpoint is accepted as correct, the instructions made it possible for the jury to conclude that the "average person" has some of the attributes of a child. This is exactly what was condemned in *Pinkus*.¹⁷ More significantly, even if the jury could have concluded that "person" meant "adult," it cannot be certain that this is what it *did* do since its verdict was a general one. *Sandstrom v. Montana*, U.S., 99 S.Ct. 2450.

¹⁷This Court in *Pinkus* equated the average person in the relevant community with the arithmetic mean of the local adult population. The Fifth Circuit's assumption that the words "average . . . attitude . . . and . . . average interest in sex" found in the instructions directed jury consideration solely to the contemporary standards of this adult population is unwarranted. Said average attitudes and interests when not specifically restricted to adults are merely components of an "average person" who is the arithmetic mean of the combined local adult and child population. The whole is equal to the sum of its parts and no more. The "whole" as contemplated by the Fifth Circuit necessarily encompasses some of the attributes of a child.

VI.

In an Obscenity Prosecution Involving Films of an Exclusively Homosexual Orientation an Instruction Foreclosing Jury Assessment of the Prurient Appeal, if Any, of the Films to Homosexuals Absent Proof Beyond a Reasonable Doubt That the Films Were Intended to Appeal to the Prurient Interest of Homosexuals Deprived Petitioner of Freedom of Speech and Press and Due Process of Law Contrary to the Provisions of the First and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

The opinion of the Fifth Circuit omitted entirely a discussion of the manifestly erroneous jury instruction which directed that prurient appeal be measured by the standards of the average person when the films were clearly directed to a deviant group. *A fortiori*, the instruction given precluded any consideration whether the films had a prurient appeal to members of the homosexual community.¹⁸

All the subject films depicted male homosexual conduct exclusively and it was undisputed that the *intended and probable* recipients of the films were homosexuals. The court, over objection, instructed in essence that prurient appeal is to be judged with reference to the average person instead of only to members of the intended deviant recipient group contrary to the teaching of *Mishkin v. New York*, 383 U.S. 501,

¹⁸No testimony was adduced during the trial to the effect that the charged films appealed to the prurient interest of homosexuals. In fact, the court denied petitioner's pre-trial motion to compel the prosecution to elect whether the alleged prurient appeal of the films was to average adults or to members of the homosexual community. (C.T. Vol. 2, Doc. 42.)

and *Pinkus v. United States*, 436 U.S. 293 (error to include children as part of community for purposes of determining prurient appeal unless children shown to be intended and probable recipients). The court admonished the jury that *before* pruriency could be assessed in terms of sexual interest of the intended and probable recipients of the films, *i.e.*, homosexuals, there must be *proof beyond a reasonable doubt* that the films were "*intended to appeal to the prurient interest*" of homosexuals.¹⁹ Whether the maker of the films *intended* them to appeal to the prurient interest of homosexuals is not only irrelevant but impossible to ascertain. Accordingly, since such an intent could not be proved beyond a reasonable doubt, the jury was foreclosed from assessing whether the films appealed to the prurient interest of members of the homosexual community. The consequence of requiring proof of intent beyond a reasonable doubt was to unconstitutionally shift the burden of persuasion to petitioner, a practice which was condemned in *Mullaney v. Wilbur*, 431 U.S. 684, 701-04. See *In re Winship*, 397 U.S. 358, 364.

¹⁹The court instructed as follows:

"In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals." (R.T. Vol. 11 at G-215, G-216.)

VII.

A Juror Who Read a Book and Frequently Stared at the Floor on the Sole Occasion When the Allegedly Obscene Films Were Screened for the Jury Was Either Incompetent to Render a Judgment Regarding the Obscenity Vel Non of the Films Which Must Be "Taken as a Whole" Under the Directive of Miller v. California, 413 U.S. 15, or so Prejudiced Against the Defense That Petitioner Was Deprived of Freedom of Speech and Press, Due Process of Law, and an Impartial Jury, Contrary to the Provisions of the First, Fifth and Sixth Amendments to the Constitution.

There is substantial evidence that Juror Kohring was reading a magazine and staring at the floor during much of the time when the five films in question were screened in court for the jury. It was the only occasion on which the jurors saw these films.

Under the facts presented a magistrate seeing only what Kohring saw would not have *probable cause* to issue a warrant to seize the film, *United States v. Tupler*, 564 F.2d 1294, 1297-98 (9th Cir. 1977). This is because *Miller v. California*, 413 U.S. 15, requires that a film be considered *as a whole* by the trier of fact charged with the application of the obscenity formulation. If Kohring did not have probable cause to believe the films obscene, then *a fortiori* he could not have found them obscene *beyond a reasonable doubt* and petitioner was deprived of his Fifth Amendment rights.

Juror Kohring was incompetent to render a judgment regarding the obscenity *vel non* of the films. Moreover, Kohring should have been replaced by an alternate

juror who was not so obviously *prejudiced* against the defense since petitioner was entitled under the Sixth Amendment to an *impartial* jury.

VIII.

In an Obscenity Prosecution Involving Films of an Exclusively Homosexual Orientation the Refusal of the District Court to Voir Dire the Veniremen Concerning Their Length of Residence in the Community, Participation in Community Organizations, Knowledge of Community Standards From the Standpoint of Personal Exposure, Knowledge of the Mores, Customs and Practices of the Homosexual Community and Opinion Whether Sexually Explicit Matter Causes Harm Negated the Mandate of Smith v. United States, 431 U.S. 291, That a Defendant Be Given Reasonable Latitude in Presenting Voir Dire Questions to the Veniremen and, Accordingly, Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution.

The trial court erred in failing to ask the requested *voir dire* questions propounded by petitioner particularly as they related to the jurors' length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure (this was particularly significant since comparison evidence was not allowed to be introduced), opinion as to whether sexually explicit matter causes harm, their knowledge of the mores, customs and practices of the homosexual community and their opinion whether sexually explicit matter causes

harm.²⁰ *Smith v. United States*, 431 U.S. 291, 308, mandates that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen, but leaves the decision of the propriety of a particular question to the discretion of the trial court. It must be noted the trial herein occurred in Florida at the time of Anita Bryant's Crusade. It was therefore especially important to petitioner to obtain answers from the jurors to specific and focused questions dealing with their beliefs, experiences and prejudices.

The *voir dire* questions submitted to the trial court by petitioner were the very sort of questions *Smith* indicated were proper. (R.T. Vol. 5, A-125 to A-127.) For example, although a substantial number of jurors and their relatives held positions of responsibility in a church (R.T. Vol. 5, A-133 to A-136), the court refused to inquire whether these jurors would feel compelled to follow the dictates of their religion due to the fact they held church positions (R.T. Vol. 5, A-192) or whether the jurors could put aside their religious beliefs and follow the law as given them by the court (R.T. Vol. 5, A-124). The failure of the court to ask these and other proffered questions

²⁰In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 and n. 6 (1973), this Court reserved judgment whether expert testimony is required "where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Since the films in question herein exclusively depict homosexual acts, it was highly relevant to know whether the jurors had knowledge of the mores, customs and practices of the homosexual community to ascertain if their experience in the absence of expert testimony was inadequate to judge such material. Moreover, it bears noting that *no* expert testimony adduced in this case specifically concluded that the films appealed to the prurient interest of members of the homosexual community.

of the veniremen undoubtedly prejudiced petitioner. Perhaps if the Court had allowed petitioner Walter's Requested *Voir Dire* Question 11 ("able to view . . . with open eyes and an open mind.") (C.T. Vol. 2, Doc. 46 at 14), the Kohring incident would not have happened.

IX.

Due Process of Law Under the Fifth Amendment Required That Petitioner's Case Be Severed From Co-Defendant Sanders' so That Co-Defendant Grassi, Who Had Entered a Guilty Plea During Trial Could Testify to Exculpate Petitioner and Inculpate Sanders on the Scierter Issue, Which Grassi Had Indicated He Would Do but Not Unless There Were a Severance Since His Former Attorney Was Counsel for Co-Defendant Sanders and Could Impeach Grassi With Other Crimes Grassi Had Confidentially Communicated to Him if Grassi Waived His Attorney-Client Privilege and Testified in Favor of Petitioner and Against Co-Defendant Sanders.

At least five grounds necessitated the severance of petitioner's case from that of defendant Sanders. First, Sanders was the subject of much adverse pretrial publicity. (C.T. Vol. 1, Doc. 24.) Second, trial testimony of Carol Maxey depicted Sanders as having threatened her. (R.T. Vol. 9, E-86 to E-93.) Third, Carol Maxey testified to hearsay statements by Sanders which were improperly admitted against Walter, contrary to *Bruton* requirements. (R.T. Vol. 9, E-24 to E-26, E-33, E-39, E-44, E-45.) Fourth, Sanders was represented by an attorney who told a prosecution witness to "take the Fifth Amendment" and who drafted a government trial exhibit which the government contended was false (Appendix E). Fifth, had there been a

severance co-defendant Grassi would have testified without fear of impeachment by his former attorney Zell to exculpate Walter on the *scienter* issue regarding his absence of knowledge of the shipment and the character of its contents *prior* to its misdelivery. Each of the aforesaid grounds would warrant a severance; collectively, they cry out for it. A severance should have been granted under Rule 14, Fed. R. Crim. P., since petitioner's joint trial with defendant Sanders and his counsel was so prejudicial that it was a clear abuse of discretion not to grant a severance. See, *e.g.*, *United States v. Marshall*, 532 P.2d 1279 (9th Cir. 1976).

X.

The Refusal of the District Court to Give Petitioner's Proffered Jury Instruction on His Theory of the Case Developed Through Cross-Examination That Certain Terms in the Obscenity Formulation Were Incapable of Calculation Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

One defense theory in the case was that certain terms in the obscenity formulation were incapable of ascertainment. For example, the defense contended both during cross-examination and final argument that it is impossible to calculate "the average person" and because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual. (R.T. Vol. 10 at F-118, F-119; Vol. 11 at G-119 to G-121.) "The average person"

differs from "the average reasonable man" of tort law not only because the term is a logical impossibility, but also because it must be proved beyond a reasonable doubt instead of by a preponderance of the evidence.

The petitioner sought a jury instruction to the effect that if the jurors could not ascertain the meaning of certain terms in the obscenity formulation or could not compute them, then the jury must acquit. (C.T. Vol. 2, Doc. 45, at 20, No. 48.) This request was not unreasonable given the complexities of the obscenity law. No less an authority than Thomas Emerson has declared: "As used in the original *Roth* case, the prurient interest test is fantastically absurd." Emerson, *System of Freedom of Expression* at 487 (1970). Emerson also declared: "To measure obscenity by the average person test makes as much sense as measuring the violent overthrow of the government by its appeal to members of the Century Club." *Id.* at 488.

When a defendant requests an instruction on a particular defense theory, he is entitled to receive it unless it is unsupported by the evidence. Cross-examination alone may provide a sufficient basis for a defense theory of the case instruction. *United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976); *United States v. Levy*, 578 F.2d 896, 903 (2d Cir. 1978); see *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976); *United States v. Swinton*, 521 F.2d 1255, 1260 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976) (dictum). In the case at bar petitioner's cross-

examination of the prosecution's expert witness directed itself at the impossibility of calculating "the average person." Therefore, petitioner was entitled to his requested instruction on a defense theory of the case.

Conclusion.

In view of the foregoing, Petitioner respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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Nos. 79-67 and 79-148

Supreme Court, U. S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM WALTER, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR RANDALL SANDERS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-67

WILLIAM WALTER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-148

ARTHUR RANDALL SANDERS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the convictions (Pet. App. 1-36)¹ is reported at 592 F.2d 788. The opinion of the court of appeals denying a

¹ "Pet. App." refers to the appendix to the petition in No. 79-67.

petition for rehearing (Pet. App. 37-39) is reported at 597 F.2d 63.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on June 15, 1979. The petitions for a writ of certiorari were filed on July 16, 1979, and were granted on October 15, 1979. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusionary rule should be applied to suppress five obscene films consensually transferred to the government by a third party to whom the films had been inadvertently misdelivered.

2. Whether petitioners' convictions should be reversed because of alleged errors by the trial court.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners Walter, Sanders and Gulf Coast News Agency, Inc., were convicted on five counts of transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1465, and on five counts of using a common carrier to transport obscene films in interstate commerce, in violation of 18 U.S.C. 1462. Each petitioner was also convicted of conspiracy to commit the substantive offenses, in violation of 18 U.S.C. 371.² Pe-

² Co-defendant Michael Grassi was tried separately and was convicted on all counts. His convictions were affirmed on

tioners Walter and Sanders were sentenced to concurrent terms of three years' imprisonment on all counts. Petitioner Trans World America, Inc. was fined \$10,000, and petitioner Gulf Coast News Agency, Inc. was fined \$3,000 on each count for a total fine of \$33,000.

1. The evidence adduced at trial and at a pretrial suppression hearing showed that petitioners Walter and Sanders were business partners who owned a network of adult cinemas, bookstores and distribution warehouses, including co-petitioners Gulf Coast News Agency, Inc., a warehouse enterprise in St. Petersburg, Florida, and Trans World America, Inc. (TWA), a like business in Atlanta, Georgia (VI Tr. 43-75, 86-101, 108, 112-113, 153-155, 168-177; VII Tr. 35-39, 184-187, 203, 210-211).³ Walter and Sanders had offices in both warehouses although they principally worked out of the TWA warehouse (VI Tr. 74-75; VII Tr. 109). Gulf Coast News, which was managed by co-defendant Richard Larson, distributed sex-oriented books and films as well as sexual

appeal. *United States v. Grassi*, 602 F.2d 1192 (5th Cir. 1979), petition for cert. pending, No. 79-809. Co-defendant Richard Larson, who was a fugitive at the time of petitioners' trial, has been apprehended and is awaiting trial.

³ "Tr." preceded by volume number designates the reporter's transcript. Volume IV of the transcript is subdivided into three separately paginated portions, each of which records testimony at the suppression hearing. The first portion will be referred to as "IV Tr." The next two portions contain the testimony of petitioner Sanders and co-defendant Michael Grassi and will be referred to as "IV-S Tr." and "IV-G Tr." respectively.

paraphernalia to a number of adult bookstores in or near St. Petersburg, Florida. It received most of its materials from TWA (VI Tr. 179-196).

In September 1975, Larson telephoned petitioner Sanders in Atlanta to report that he had been unable to sell a large quantity of homosexual films from a series entitled "David's Boys" (XII Tr. 236, 247; IV-S Tr. 3, 4, 28, 34).⁴ Sanders directed Larson to ship the films back to TWA in Atlanta via Greyhound Package Express (VII Tr. 18-19). Following Sanders' directions, Larson instructed Ronald Bowman, a shipping and receiving clerk at Gulf Coast News to prepare the "David's Boys" films for shipment. Larson told Bowman to send the materials under the name "D and L Distributors" at a non-existent address, in lieu of Gulf Coast News, and to employ "Leggs Incorporated"⁵ as the name of the intended recipient, in lieu of TWA (XII Tr. 167). In order to avoid detection by the authorities in the event the contents of its packages were discovered, Gulf Coast News consistently used fictitious shipping

⁴ Ron Akins, who operated one of petitioners' Florida adult bookstores, testified that he sold only one reel of film from the "David's Boys" series (VII Tr. 194). Walter and Sanders admitted at the suppression hearing that they had originally purchased the films for Gulf Coast News but the films were not selling and had to be returned (IV Tr. 226, 236, 247; IV-S Tr. 2-3).

⁵ "Leggs" was the nickname of a female employee at TWA (VII Tr. 25; IV 37).

information when shipping sexually explicit materials⁶ (VIII Tr. 23-24, 107).

On September 25, 1975, using these fictitious names, Bowman shipped 12 packages containing 871 individual cartons of film to Atlanta from St. Petersburg via Greyhound.⁷ The packages were labeled "printed material" and were shipped collect or "will call." This latter designation meant that the intended recipient would pick up and pay for the films at the Greyhound terminal in Atlanta (VII Tr. 23-29, 174).

Upon arrival of the shipment in Atlanta, a Greyhound employee noticed that the named recipient was "Leggs Incorporated." Believing that the name referred to L'Eggs Products, Inc., a manufacturer of women's hosiery and one of Greyhound's regular customers, he forwarded the shipment to a Greyhound substation located in the suburbs of Atlanta where L'Eggs regularly received deliveries. The twelve packages arrived at the substation on September 26, 1975, and a Greyhound employee routinely requested L'Eggs to pick up the shipment. Later that same day, Michael Horton, an area manager at L'Eggs, went to the substation; because the packages looked unusual he decided to open one. His inspection disclosed that the package contained numerous individual cartons

⁶ When Gulf Coast News shipped materials such as projector parts fictitious names were not used (VII Tr. 23-24). At the suppression hearing, Walter and Sanders testified that fictitious names were used to prevent pilferage (XII Tr. 228-229).

⁷ There were only 25 different film titles in the shipment; most of the films were duplicates (VI Tr. 158).

of explicit homosexual films. One side of each carton showed two nude males kissing and embracing; the other side contained explicit language describing the conduct portrayed on the film.⁸

Instead of accepting delivery of the packages, Horton returned to his office and reported his findings to his supervisors at L'Eggs Products (XII Tr. 57-62). After being assured by Horton that the shipment was addressed to the hosiery company, William Fox, the L'Eggs branch manager returned to the Greyhound substation, picked up the twelve boxes and brought them back to his office. He was concerned that someone was using the company's name to transport pornographic films and he did not want the company to be implicated in such an operation (IV Tr. 104, 107; XII Tr. 121, 126-127, 129).⁹ Upon Fox's return to the company's offices with the shipment, Fox, Horton and one or two other L'Eggs employees opened each of the 12 boxes and found that each contained individual cartons of eight millimeter homosexual oriented films. They read the descriptions on several of

⁸ These descriptions have been reproduced in the court of appeals' opinion (Pet. App. 10-11 n.5).

⁹ Fox testified that he thought Horton might be joking about the contents of the shipment, and wanted to investigate himself. The employees at L'Eggs also considered the possibility that a disgruntled former employee had ordered the films. No one expressed any concern over the fact that the "Leggs Incorporated" address lacked an apostrophe and the word "Products." Indeed, both Horton and Griffin Askew of Greyhound were uncertain of how the hosiery company spelled "L'Eggs" (XII Tr. 32, 74).

the cartons and one employee attempted to view one of the films by holding it to the light; his effort proved unsuccessful because the film was too small for him to discern what each frame depicted (IV Tr. 104; XII Tr. 199).

That same day, Horton telephoned FBI Special Agent Lawrence Mandyck and requested the agent to remove the films (XII Tr. 66-67, 121, 171, 199). Agent Mandyck agreed to take the films and instructed Horton to put the boxes in a safe place. Five days later, on October 1, 1975, Agent Mandyck came to the L'Eggs office, was shown the twelve open boxes as well as several of the individual film cartons and, at the company's request, removed the films and transported them to the FBI office (IV Tr. 107; XII Tr. 121, 170-172). The agent inventoried the contents of all 12 boxes and found that they contained 871 films with 25 different titles. He kept one copy of each of the 25 different films and resealed the remainder of the packages for storage at the United States Marshal's office (XII Tr. 174-175). At this point, neither Agent Mandyck nor the employees of L'Eggs knew the identity of the actual shipper or the actual intended recipient of the films; nor did they have any knowledge that anyone was looking for the films. Gregory Shults, a L'Eggs employee, was unsuccessful in his efforts to locate a telephone directory listing for another company named "Leggs Incorporated" in Atlanta, or for a "D and L Distributors" in Florida (XII Tr. 151).

In the meantime, TWA had attempted to pick up the shipment of films from Greyhound in Atlanta on September 26, 1975, but had been told by Greyhound that the packages had not arrived (VII Tr. 29). During the following week, Bowman (who had shipped the packages) went to the St. Petersburg Greyhound terminal to check on the shipment and co-defendant Larson asked Greyhound to trace the packages (VII Tr. 30-31; XII Tr. 13). During this same time period, a woman called the Atlanta Greyhound terminal to inquire whether the packages had arrived; however, she refused to leave her name (XII Tr. 36). After learning from L'Eggs that the films had been turned over to the FBI, Griffin Askew of Greyhound called the FBI to report the woman's phone call. Agent Mandyck requested Askew to try to get her name, address and phone number if she called again. She called twice more, and on the third call agreed to give her name only (XII Tr. 36, 51-52, 207-209). These calls were also reported to the FBI.

Two or three weeks after the shipment had been turned over to the FBI, Michael Grassi, a TWA employee, inquired at the hosiery company, asking if it had obtained the shipment.¹⁰ A L'Eggs representative told Grassi that the company had received the shipment, but had given the films to the FBI. Grassi informed Walter, Sanders and Larson that the films were in the possession of the FBI (IV-G Tr. 9, 19-

¹⁰ He explained that it seemed like a natural place to look (IV-G Tr. 24).

20; IV-S Tr. 5-6). Sanders thereupon instructed Larson to destroy any bills of lading traceable to "Leggs" and, after discussing it with Walter, turned the matter over to his attorney (IV-S Tr. 8, 47-48). One or two days after Grassi's inquiry, L'Eggs reported to the FBI that a Michael Grassi was looking for the films (XII Tr. 125). Neither petitioners nor any of their employees ever contacted the FBI about the films.

A month after the FBI had obtained the films, Mandyck and another agent viewed them with a projector (XI Tr. 175, 195). In February 1976, Mandyck filed an investigative report with the United States Attorney's Office. Petitioners were indicted on April 6, 1977, on charges relating to five films in the shipment. The first time petitioners sought to have their films returned was on June 3, 1977—more than 20 months after the shipment—when they filed a motion for the return of the films and for their suppression from evidence.¹¹ Petitioners did not request a prompt adversary hearing, but agreed to wait until the eve of trial to have their motion heard. See III Tr. *passim*.

2. After a hearing, on August 9, 1977, the district court denied the motion to suppress, finding that in opening, examining and transferring the material to the FBI, the L'Eggs employees had acted on their own and not at the instigation of the government (A. 33), and that contrary to petitioners' claim there was

¹¹ TWA and Gulf Coast News did not join in this motion.

no credible evidence that the government ever instructed either Greyhound or L'Eggs to conceal the whereabouts of the film (A. 34). The court concluded that suppression was not warranted under the circumstances, reasoning that petitioners had relinquished any reasonable expectation of privacy in the materials (A. 37-41, 44),¹² and, alternatively, that this case involved a private search and no government seizure within the meaning of the Fourth Amendment (A. 41-44). Noting that retention of the films by the government did not constitute a prior restraint (since there was no threat of destruction of the films and no showing that the retention of the films precluded exhibition of other copies), the court reserved decision on the motion to return the films to await the outcome of the trial which was to commence the next day (A. 22-25, 44-45). As already noted, all petitioners were convicted on all counts and duly sentenced.

¹² The district court stated (A. 37-38):

And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common carrier, namely, Greyhound Bus Lines, with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee, amounts to a relinquishment or abandonment of any reasonable expectation of privacy.

Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be mis-delivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded.

3. The court of appeals affirmed, with one judge dissenting (Pet. App. 1-36). The majority refused to consider the Fourth Amendment claim of either TWA or Gulf Coast News since neither had made a pretrial motion to suppress the films (Pet. App. 5). As to the individual petitioners, it held that the acquisition of the shipment and the search of the twelve boxes by L'Eggs was a "private search," outside the protection of the Fourth Amendment (*id.* at 6-7). The court further held that the government did not "seize" the films when it accepted the shipment from L'Eggs, and that it did not conduct an additional search when it thereafter viewed the films (*id.* at 7-12). Accordingly, on the facts of this case, the court concluded that the government was not required under the Fourth Amendment to obtain a search warrant for the films. The majority also held that there was sufficient evidence at trial to prove petitioner Walter's scienter and that the district court's instruction on the average person in the community was not error because it "* * * adequately directed jury consideration to the contemporary [community] standards of adults * * *" (*id.* at 13-17).

Judge Wisdom dissented. He concluded that the FBI's retention of the films for two years without a judicial determination of obscenity constituted a prior restraint (Pet. App. 18-24). In addition, he found that petitioners retained a possessory interest and a legitimate expectation of privacy in the films, and concluded that petitioners' Fourth Amendment rights

were violated by the warrantless acquisition and viewing of the films by the FBI (*id.* at 24-36).

In a *per curiam* opinion denying rehearing, the majority of the panel observed that even if the government's retention of the films had constituted a "prior restraint," the proper remedy was the return of the property to its owner, not its suppression from evidence at a criminal trial (Pet. App. 38-39).

SUMMARY OF ARGUMENT

The issues presented in this case are readily divisible into two parts. The first concerns whether petitioners were entitled to exclusion of the films from evidence because of alleged violations of petitioners' rights under the Fourth and First Amendments. The second involves alleged errors by the district court in the conduct of the trial. As we demonstrate below, neither set of contentions affects the legality of petitioners' convictions.

I.

A. The Fourth Amendment protects people from unreasonable governmental intrusion only in situations where there is a legitimate expectation of privacy. When petitioners shipped the films by common carrier to a recipient with a fictitious name, they assumed the risk that the films would come into the possession of an unknown private party who would open the boxes, discover the nature of the films, and turn them over to law enforcement authorities. Thus, petitioners, by their own actions, relinquished any legitimate expectation that the films would remain private. Nor may petitioners claim any

additional expectation of privacy by virtue of the fact that the films were "arguably protected" by the First Amendment. Whatever privacy rights petitioners may have had under the First Amendment if they had chosen to possess the films at home, they relinquished any special privacy claim by transporting the films in interstate commerce by common carrier.

B. Even if petitioners retained a legitimate expectation of privacy with respect to the packages containing the films, they are not entitled to suppression because the films did not come into the government's possession by means of an unconstitutional search or seizure. As this Court held in *Burdeau v. McDowell*, 256 U.S. 465 (1921), the Fourth Amendment applies only to searches and seizures involving government action. The ruling in *Burdeau* is consistent with the primary purpose of the exclusionary rule—to deter constitutional violations by law enforcement officials. In taking possession of the packages and opening them to inspect their contents, the employees of L'Eggs were acting purely in a private capacity and not at the instigation, or with the participation, of the government. Moreover, although the government ordinarily must obtain a warrant prior to seizing material "arguably protected" by the First Amendment, there was no "seizure" when the FBI accepted the shipment of films that was voluntarily relinquished by L'Eggs. The warrant requirement is simply inapplicable in the case of a consensual transfer such as occurred here. Finally, the FBI was not required to obtain a warrant before screening the

films. The boxes containing the films had been opened by L'Eggs personnel before the films were transferred to the FBI. Because the exterior of the individual film cartons explicitly described the sexual activity depicted in each film, petitioners had no remaining legitimate privacy interest in the films, and thus the viewing of the films did not violate petitioners' Fourth Amendment rights.

C. The government's failure prior to indictment to arrange for an adversary hearing on the issue of obscenity *vel non* does not require suppression of the films from evidence. The films were in the process of being returned for storage and were not seized by the government for the purpose of destruction or censorship. Under these circumstances, the retention of the films by the government did not even arguably restrict petitioners' right to distribute the films. In addition, petitioners made no request for return of the films or for an adversary hearing until almost 20 months after they received actual notice that the films were in the government's possession. Since petitioners are thus themselves primarily responsible for any delay in obtaining an adversary proceeding, they cannot claim an infringement of their First Amendment rights. Moreover, even if their First Amendments rights were violated, petitioners were entitled to no more than the return of the films, not their suppression at trial.

II.

A. Petitioners' challenges to the jury instructions are without merit. The trial court instructed the jury to consider whether the material was obscene "in light

of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in sex." This instruction properly directed the jury to apply an adult standard in judging the material, and was consistent with this Court's holding in *Pinkus v. United States*, 436 U.S. 293 (1978). The trial court correctly refused to comply with petitioner Walter's request for an instruction that certain terms in the definition of obscenity are impossible to calculate. Petitioner Walter's attack upon the obscenity definition raises not a question of fact for the jury, but one of law that the courts have consistently rejected. In addition, the court properly instructed the jury to consider the prurient appeal of the films either to the average person in the community or to members of a deviant sexual group. The jury was told that the burden was on the government to show that the films were intended for homosexuals before their appeal to that deviant group could be considered.

B. The evidence was sufficient to show that petitioner Walter was aware of the pornographic nature of the material he purveyed. Despite the fact that Walter owned and operated an extensive network of "adult" movie theaters, bookstores and warehouses, he attempted to conceal his interest in the business. On several occasions, petitioners' employees were arrested for selling obscene goods. This is not a case in which a legitimate bookseller inadvertently stocks an obscene book. The evidence thus established Walter's scienter to commit the offenses of which he was convicted.

C. The district court did not abuse its discretion in its handling of Walter's complaints that one of the jurors was not paying adequate attention to the films. The trial court's finding that the juror was sufficiently attentive was accepted by the court of appeals and should not be disturbed by this Court.

D. The trial court properly exercised its discretion in conducting the jury voir dire. Although the court did not specifically question each prospective juror concerning his length of residence in the community, the court did ask most of the jurors either about their period of residence in the community, or their length of service at their present place of employment. Furthermore, the members of the jury pool were required to have resided in the community for at least one year, a sufficient period for them to become familiar with local standards.

E. The district court properly denied petitioner Walter's motion for a severance of his trial from that of petitioner Sanders. The evidence against both Walter and Sanders was essentially the same. Moreover, the court adequately questioned the jury on voir dire concerning pretrial publicity directed at Sanders. In addition, the testimony of Sanders' girlfriend regarding conversations between Walter and Sanders was admissible against both defendants. Finally, Walter made no credible showing that co-defendant Michael Grassi would have testified in his behalf at a separate trial, and it is unlikely that Grassi's testimony would have been helpful to Walter's case in any event.

ARGUMENT

I. THE INTRODUCTION INTO EVIDENCE OF THE FIVE ALLEGEDLY OBSCENE FILMS DID NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FOURTH OR FIRST AMENDMENTS

A. There Was No Fourth Amendment Violation Since Petitioners Had No Legitimate Expectation Of Privacy With Respect To The Films

This Court has "recognized special constraints upon searches and seizures of material arguably protected by the First Amendment * * *." *Lo-Ji Sales, Inc. v. New York*, No. 78-511 (June 11, 1979), slip op. 6 n.5. Where expressive materials sought to be seized may be subject to First Amendment protection, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485 (1965). See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). Invoking this principle, petitioners primarily argue (Walter Br. 22-34; Sanders Br. 13-17) that the manner in which the government acquired and inspected the films in this case did not meet the strict requirements of the Fourth Amendment. We submit at the outset, however, that the Fourth Amendment is simply inapplicable here because petitioners had no legitimate expectation of privacy in the films.

"The Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Whenever an individual has a legitimate expectation of privacy, he is entitled to be free from unreasonable governmental intrusion. See *Rakas v.*

Illinois, 439 U.S. 128, 143 (1978); *id.* at 150-153 (Powell, J., concurring); *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *United States v. Miller*, 425 U.S. 435, 440 (1976); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). It follows that one is sometimes entitled to claim the protection of the Fourth Amendment without having a property right in the invaded area. But, on the other hand, "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Rakas v. Illinois*, *supra*, 439 U.S. at 144 n.12. See also *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Warden v. Hayden*, 387 U.S. 294, 304 (1967).¹³ Moreover, a "legitimate" expectation of privacy does not arise from an individual's subjective expectation of not being discovered; rather, the expectation must be "one that society is prepared to recognize as 'reasonable.'" *Rakas v. Illinois*, *supra*, 439 U.S. at 144 n.12, quoting from *Katz v. United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring).

Thus, the Fourth Amendment does not protect persons engaged in crime from the risk that those with whom they associate or converse will cooperate with

¹³ While the Court has not completely abandoned the use of property concepts in determining the presence or absence of privacy interests protected by the Fourth Amendment, it has made quite clear that "arcane distinctions" of property law are not controlling in deciding Fourth Amendment questions. See *Rakas v. Illinois*, *supra*, 439 U.S. at 143, 144 n.12, 149-150 n.17.

the government. See *United States v. Caceres*, 440 U.S. 741, 750-751 (1979); *United States v. White*, 401 U.S. 745, 751-752 (1971) (plurality opinion); *Alderman v. United States*, 394 U.S. 165, 179 n.11 (1969); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *id.* at 213 (Brennan, J., concurring). Similarly, where two people have joint access to, or control of property, it is reasonable to recognize that each person may permit inspection in his own right, and that each has assumed the risk that the other might permit a search of the common property. See *United States v. Matlock*, 415 U.S. 164, 170-171 & n.7 (1974); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). By the same token, it follows that one who abandons incriminating property has no justifiable expectation that such property will not be examined by others, including government agents. See *Abel v. United States*, 362 U.S. 217, 240-241 (1960); *Hester v. United States*, 265 U.S. 57, 58 (1924); *United States v. Miller*, 589 F.2d 1117, 1133-1134 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); *United States v. Pruitt*, 464 F.2d 494, 495-496 (9th Cir. 1972).

Applying these principles to the facts of this case, we submit that petitioners had no legitimate expectation of privacy with respect to either the packages or the films that they shipped by common carrier¹⁴ un-

¹⁴ Because the tariffs of most common carriers include a right of inspection, resorting to common carriers in itself reflects a diminished expectation of privacy in the contents of the shipment. See *United States v. Orito*, 413 U.S. 139, 142 n.5 (1973).

der fictitious names. In doing so, they assumed the risk that the packages would be mistakenly delivered to an innocent third party, who would ascertain their contents and turn the packages over to law enforcement authorities. Moreover, by placing each reel of film inside a carton whose exterior contained an explicit description of the sexual activity portrayed in the film, petitioners unquestionably abandoned any expectation of privacy with regard to the nature of the material (see pages 39-41, *infra*). Thus, while petitioners may have retained an abstract proprietary interest in the packages of film, by their own actions they relinquished any legitimate expectation that the films would remain hidden from scrutiny by others.

It is not enough that petitioners may have had subjective expectations that their criminal scheme would not be discovered (Walter Br. 24-25); any such expectations were not of the sort that society is prepared to recognize as "reasonable." It is therefore immaterial that the packages were secured to prevent breakage during shipment, or that previous shipments under fictitious names had not been misdelivered. Nor does the explanation that fictitious names were used to prevent pilferage, even if true, have any bearing on the legitimacy of petitioners' expectations of privacy with regard to the films, since it was not reasonable to expect that the contents of the packages would remain private once misdelivery occurred.

Finally, the fact that the packages contained material that was "arguably protected" by the First

Amendment does not affect the determination whether petitioners had a legitimate expectation of privacy under the Fourth Amendment with respect to the packages and their contents. The right under the First Amendment to possess obscene material in the privacy of one's home (see *Stanley v. Georgia*, 394 U.S. 557 (1969)) does not give rise to a correlative right to privacy in transporting such material in interstate commerce. *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 128 (1973). This Court has rejected the notion "that some zone of constitutionally protected privacy follows [obscene] material when it is moved outside the home area * * *." *United States v. Orito*, 413 U.S. 139, 141-142 (1973). Thus, whatever privacy rights petitioners may have had by virtue of the First Amendment if they had chosen to possess the material at home, they surrendered any special privacy claim by transporting the obscene films in interstate commerce by common carrier. See *id.* at 142.

If the Court agrees with this submission, petitioners' Fourth Amendment contentions are at an end. But even if petitioners may be said to have retained some "legitimate" expectation that the contents of the packages would remain undisclosed, the record shows that there was no unreasonable search or seizure within the meaning of the Fourth Amendment.

B. The Fourth Amendment Was Not Violated Because There Was No Unreasonable Search Or Seizure In This Case

1. The Fourth Amendment does not apply to private searches and seizures

At least since *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921),¹⁵ the governing principle has been that the protections of the Fourth Amendment attach only to searches and seizures involving "governmental action;" or, stated otherwise, the protections of the Amendment do not reach "the act of individuals in taking the property of another." *Ibid.* In *Burdeau*, private detectives entered McDowell's private office, where they blew open two safes, forcibly opened his desk and removed McDowell's private papers, which they turned over to the government. McDowell sought the return of his papers, which he alleged were about to be presented to a grand jury investigating mail fraud violations. The district court concluded that even though the government had not acted unlawfully, McDowell's papers had been illegally and wrongfully taken from him in violation of the Fourth Amendment, and "the Government should not use stolen

¹⁵ Earlier, in *Weeks v. United States*, 232 U.S. 383, 398 (1914), this Court held that only the actions of federal, not state, officials were subject to the terms of the Fourth Amendment. That, of course, is no longer the law. See *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 643 (1961). But neither *Elkins* nor *Mapp* casts doubt upon the continued vitality of the *Burdeau* rule. See 1 W. LaFare, *Search and Seizure, A Treatise on the Fourth Amendment* 111-112 (1978).

property for any purpose after demand made for its return." *Id.* at 472.

This Court reversed (256 U.S. at 475):

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Since government agents had nothing to do with the wrongful seizure of McDowell's property, the Court concluded that "there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure." *Ibid.*¹⁶ See also *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).¹⁷

¹⁶ The Court assumed that McDowell had "an unquestionable right of redress against those who illegally and wrongfully took his property." 256 U.S. at 475.

¹⁷ Accord, e.g., *United States v. Goldstein*, 532 F.2d 1305, 1311 (9th Cir.), cert. denied, 429 U.S. 960 (1976); *United States v. Harvey*, 540 F.2d 1345 (8th Cir. 1976); *United States v. Harless*, 464 F.2d 953 (9th Cir. 1972); *Wolf Low v. United States*, 391 F.2d 61 (9th Cir.), cert. denied, 393 U.S. 849 (1968); *Barnes v. United States*, 373 F.2d 517 (5th Cir. 1967).

The *Burdeau* rule is consistent with the policies of the exclusionary rule. The principal, if not the exclusive, purpose of the exclusionary rule is to deter constitutional violations by law enforcement officers by removing the incentive to commit those violations. See, e.g., *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976). As the Court noted in *Janis*, "the exclusionary rule, as a deterrent sanction, is not applicable where a private party * * * commits the offending act." *Id.* at 456 n.31. Extension of the exclusionary rule to private searches would not advance the purpose of deterrence, since, unlike a law enforcement official, the private searcher "is often motivated by reasons independent of a desire to secure criminal conviction and * * * seldom engages in searches upon a sufficiently regular basis to be affected by the exclusion sanction." 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* 113 (1978). See Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 Stan. L. Rev. 609, 614-615 (1967). The possibility of civil and criminal sanctions against a private party engaging in an illegal search is a sufficient deterrent against unofficial invasions of privacy. Any incremental deterrent benefits provided by imposition of an exclusionary sanction are outweighed by the substantial costs to society of failing to have the guilty brought to book. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 275-276 (1978); *United States v. Janis*, *supra*, 428 U.S. at 453-454; *United States v. Calandra*, 414 U.S. 338, 349, 351

(1974); *Alderman v. United States*, *supra*, 394 U.S. at 174-175.¹⁸

¹⁸ Relying on *Shelley v. Kraemer*, 334 U.S. 1 (1948), petitioner Walter argues (Br. 23-24) that a private search and seizure becomes a governmental search and seizure when items obtained in a private search are admitted into evidence at trial. In *Shelley*, the Court held that judicial enforcement by state courts of restrictive covenants based on race or color violated the Equal Protection Clause of the Fourteenth Amendment. The continued vitality of *Burdeau* has not been put in doubt by *Shelley*. See 1 W. LaFave, *supra*, at 138-139. In *Shelley*, "the lower court was asked to compel a private citizen to do an act which would be unconstitutional for the state to perform," whereas in the private search context the court is "merely asked to give evidentiary status to illegally seized information." Comment, 46 Minn. L. Rev. 1119, 1124-1125 (1962). Furthermore, in the private search situation, the constitutional violation, if any, has already occurred at the time of the search or seizure. A ruling on a suppression motion will neither create nor eliminate the violation. See Note, *supra*, 19 Stan. L. Rev. at 614. By choosing to admit evidence garnered during a private search and seizure, a court is not sanctioning the private action; rather it is merely recognizing that no deterrent purpose will be served by the exclusion of that evidence in a criminal trial.

In addition, we note that the holding in *Shelley v. Kraemer* has been limited to its factual setting. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Peterson v. City of Greenville*, 373 U.S. 244 (1963). For example, in *Moose Lodge* the Court noted that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations * * * in order for the discriminatory action to fall within the ambit of constitutional prohibitions." 407 U.S. at 173, quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); see also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Thus, the Court held in *Moose Lodge* that a state's grant of a liquor license to a private club that practiced racial discrimination did not render the discriminatory practice of that club "state action" for purposes of the

In the instant case, as both the district court (A. 28-29) and the court of appeals (Pet. App. 4) found, the L'Eggs personnel took possession of, and inspected the packages that appeared to be addressed to L'Eggs because they were concerned that someone was using the company's name to transport obscene material in interstate commerce. Petitioners, who used fictitious names in shipping the packages containing obscene films, were thus responsible for L'Eggs' acquisition and examination of the packages and their contents. The actions of the L'Eggs employees are a far cry from the blatantly improper conduct engaged in by the private detectives in *Burdeau*. Unlike the situation in *Burdeau*, this is not a case where petitioners' private materials "were stolen [and] [t]he thief, to further his own ends, delivered them to the law officer of the United States." *Burdeau v. McDowell*, *supra*, 256 U.S. at 476 (Brandeis, J., dissenting).

In any event, as both courts below found (A. 33; Pet. App. 7), the "seizure" and "search" of the packages by the L'Eggs employees were not precipitated or participated in by government agents. Neither was accomplished with the government's knowledge or in the government's presence. Neither was performed for the purpose of assisting in law enforcement, or as a means of gaining any benefit from the government. Nor was L'Eggs performing what is normally a governmental function when it

Equal Protection Clause of the Fourteenth Amendment. Here, receipt by the government of evidence obtained during a private "search" did not change the character of the search.

picked up and opened the packages that appeared to be addressed to it.¹⁹ In sum, it is plain that both the seizure and search by L'Eggs were, in every sense of the word, private.²⁰ Accordingly, the actions of the L'Eggs employees provide no basis for exclusion of the films from evidence at petitioners' trial. The only remaining question under the Fourth Amend-

¹⁹ Some have argued, based on the reasoning of this Court in *Marsh v. Alabama*, 326 U.S. 501 (1946), that the exclusionary rule should apply to unlawful searches by private parties acting in the capacity of government officials, such as security guards who perform a law enforcement function in a private business. See Note, *supra*, 19 Stan. L. Rev. at 614-618. See also *United States v. Francoeur*, 547 F.2d 891, 893-894 (5th Cir.), cert. denied, 431 U.S. 932 (1977); *United States v. Ellison*, 469 F.2d 413, 414-415 (9th Cir. 1972). Although we submit that the deterrent effect of extending the rule to those situations would be *de minimus*, there is no reason to decide the question here. It cannot be argued that L'Eggs' employees, by picking up a parcel apparently addressed to the company, were performing a quasi-governmental function.

In his dissent, Judge Wisdom stated (Pet. App. 19) that a Greyhound employee, on the instructions of the FBI, refused to inform petitioners that the packages had been taken to L'Eggs' offices. Apart from the fact that the district court refused to credit this evidence (A. 34), it has no bearing on whether the L'Eggs employees acted at the behest of the government in taking and opening the packages and turning them over to the FBI.

²⁰ Viewing the *Burdeau* holding "in its broadest sense," Judge Wisdom, dissenting below, observed that it "permits the government to accomplish circuitously what it could not accomplish directly" (Pet. App. 29). Whether that observation has any validity, it has no bearing here, where an unintended recipient received packages and, upon examining their contents, turned the packages over to the government on its own initiative.

ment is whether, after L'Eggs turned the films over to the FBI, the government's receipt, and subsequent viewing, of the films without first obtaining a warrant constituted an unreasonable "seizure" or "search."

2. *There Was No "Seizure" Under The Fourth Amendment When The Films Were Transferred To The Government By L'Eggs*

As we have shown, the Fourth Amendment did not restrict L'Eggs' freedom to take possession of and search the 12 packages containing the films. Furthermore, once L'Eggs had dominion and control over the property, so far as petitioners' Fourth Amendment rights are concerned, L'Eggs was at liberty to dispose of the packages as it wished; it could have kept the films, discarded them in the trash, or returned them to Greyhound. As it happens, once the L'Eggs employees discovered the nature of the films, they contacted the FBI and, as both courts below found (A. 33; Pet. App. 9), voluntarily turned the films over to the government. Petitioners contend (Walter Br. 24-28; Sanders Br. 13-14) that the government's acceptance of the films without first procuring a warrant constituted an unreasonable seizure and violated petitioners' rights under the Fourth Amendment. We disagree.

To begin with, as the court of appeals correctly observed, the argument that a warrant is needed before government agents may obtain property discovered in a private search is inconsistent with *Burdeau v. McDowell*, *supra*, and its progeny (Pet.

App. 8): "In every such case, introducing the fruits of a private search as evidence was impossible unless the private party had at some point surrendered the articles to the Government. Yet [neither the court of appeals nor this Court has ever] held that government acceptance of those articles constitutes a seizure requiring compliance with the warrant requirement, even in cases where no exception to that requirement would have covered the Government's action."

This observation is consistent with this Court's statement in *Hale v. Henkel*, 201 U.S. 43, 76 (1906), that a "seizure" in Fourth Amendment terms contemplates a forcible dispossession of the owner. We submit that, just as a policeman may engage in personal intercourse with an individual without effecting a seizure of that person under the Fourth Amendment (see *Terry v. Ohio*, *supra*, 392 U.S. at 19 n.16), so too the actions of government agents in accepting property voluntarily relinquished by its possessor are not subject to scrutiny under Fourth Amendment standards.

Petitioners, however, advance three arguments in support of their contention that the government's acceptance of the films was a seizure. First, they argue that the transfer of the films was a deprivation of their property interests (Walter Br. 28; Sanders Br. 14); second, they assert that L'Eggs had no authority to consent to the transfer (Walter Br. 27); and third, they contend that because their First Amendment rights were implicated, the transfer must be

deemed a seizure under the Fourth Amendment (Walter Br. 28; Sanders Br. 13-14). None of these arguments is persuasive.

a. When L'Eggs' employees opened the packages and inspected their contents, petitioners lost any legitimate expectation of privacy they may have had with respect to the films. Nevertheless, they argue that the government's receipt of the films was a seizure because petitioners retained a "property interest" in the films.²¹ But this approach elevates "arcane distinctions" developed in the law of property over the privacy interests that the Fourth Amendment is meant to protect. Under the Fourth Amendment, an individual's interest in property is relevant, if at all, only in determining whether that person has a reasonable expectation of privacy in the property. See *Rakas v. Illinois*, *supra*, 439 U.S. at 144 n.12. Once that expectation of privacy has been removed as the result of a private search, the individual is not entitled to the exclusionary remedies of the Fourth Amendment, regardless of his proprietary relationship to the property. One method of asserting one's property interests is by filing a motion for

²¹ We do not dispute petitioners' assertion that they had a "property interest" in the films. At the suppression hearing petitioners Walter and Sanders testified that they had owned the films and had ordered their shipment to Atlanta. Indeed, petitioner Walter admitted that he had originally purchased the films and was aware of their contents (XII Tr. 226). Under *Simmons v. U.S.*, 390 U.S. 377, 399 (1968), the government could not use this testimony at trial to prove Walter's scienter, and instead had to rely on circumstantial evidence. See pages 58-60, *infra*.

return of the items, although the owner's property interests are subject to the government's superior interest in retaining property that may be used as evidence. *United States v. Sherwin*, 539 F.2d 1, 8 n.10 (9th Cir. 1976) (en banc).²² Petitioners did not move for return of their property, however, until after indictment, almost 20 months after they were informed that the films had been transferred from L'Eggs to the government (see page 42, *infra*).

Nor do we perceive what purpose a search warrant would have served in this case. The protection afforded by a warrant "consists in requiring that * * * inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). But probable cause is irrelevant in the case of a consensual transfer such as occurred here. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). In accepting the films, the government was simply complying with the request of a reputable firm seeking to dispose of what appeared to be "hard core" pornographic material that apparently had been addressed to it. In these circumstances, even had a warrant been sought and the judicial officer determined that there was no prob-

²² An aggrieved owner of property wrongfully taken in a private search may also institute a civil action against the offending party, and seek to press criminal charges (see page 23, note 16, and page 24, *supra*).

able cause for its issuance, it is difficult to believe that the government could realistically have refused to perform the custodial role of taking possession of the films at the behest of L'Eggs. This is particularly so where, as here, neither L'Eggs nor the government was then aware of the shipper's identity. In a word, for the government to have secured a warrant when it accepted delivery from L'Eggs would have been an empty ritual diluting the high purpose the warrant requirement is meant to serve. See *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

b. In our view, the FBI's receipt of the packages from L'Eggs is indistinguishable for Fourth Amendment purposes from other situations in which the government is called upon to relieve a citizen of unwanted material. Just as the police may, without a warrant, accept an objectionable, unsolicited mailing from a private recipient, so too should the government accommodate the unintended recipient of a shipment of obscene films seeking to divest itself of the films for fear that someone is using its name to conduct a pornographic business. Petitioner Walter contends, however, that L'Eggs had no authority to consent to the transfer. That contention is contrary to this Court's decision in *Coolidge v. New Hampshire*, *supra*.

In *Coolidge*, the police came to the defendant's home to question his wife about his activities on the night of the crime. During the questioning, she voluntarily produced four of her husband's guns and

some of his clothing and asked the police officers if they wanted to take them. The Court held that the police could accept Mrs. Coolidge's offer without first obtaining a warrant, despite the lack of any proof that she had authority to transfer her husband's property to the police. Citing *Burdeau v. McDowell*, *supra*, the Court observed that "[h]ad Mrs. Coolidge, wholly on her own initiative, sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence." 403 U.S. at 487. And, in language as telling here as in *Coolidge*, the Court stated that "it is no part of the policy underlying the Fourth * * * Amendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.* at 488.

In circumstances similar to those present here, the Ninth Circuit, sitting en banc in *United States v. Sherwin*, *supra*, concluded (539 F.2d at 7-8):

For the purpose of determining if a seizure has taken place, * * * only the fact of consent is relevant, not whether it was properly authorized. * * * The private person's legal authority to approve a transfer of objects found in a private search has no bearing on whether his relinquishment of those objects to the government is coerced or voluntary. * * * If a transfer is voluntary, then it is not a seizure and the fourth amendment's reasonableness standard is simply inapplicable.

Thus, the legitimacy of the transfer in this case does not turn on whether petitioners authorized it. In relinquishing the films, L'Eggs was not acting as petitioners' agent; indeed, L'Eggs' representatives were unaware that petitioners were the owners of the films. Rather, the transfer here occurred wholly on L'Eggs' own initiative and with its own legitimate motivation. By shipping the films under fictitious names, petitioners assumed the risk that the films would voluntarily be turned over to the government by an unintended recipient. They should not now be heard to complain that the relinquishment of the films was not pursuant to their authorization.

Petitioners heavily rely (Walter Br. 24-25, 27-28; Sanders Br. 14) on *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976), in support of their position that the government was required to obtain a warrant before accepting the films from L'Eggs. But *Kelly* is readily distinguishable on its facts. In *Kelly*, the defendant used a common carrier to ship merchandise to his adult bookstore. On seven or eight occasions, the carrier discovered that the packages had been broken into and contained obscene materials; each time it notified the FBI which, in turn, inspected the packages, often taking samples, before the remainder of the shipment was released for delivery. On these facts, the Eighth Circuit held (529 F.2d at 1371) that even though the books and magazines were taken with the consent of the carrier, that consent did not satisfy Fourth Amendment requirements—citing, *inter alia*, *Stoner v. California*, 376 U.S. 483 (1964), where the government pur-

posely sought to use a third party to institute a governmental search in order to circumvent the warrant requirement. Accordingly, to the extent that *Kelly* reaffirms the *Stoner* rationale it is not inconsistent with our position here, for it is beyond serious dispute that neither Greyhound nor L'Eggs had any working arrangement with the government. To the extent, however, that *Kelly* may be read as requiring a warrant before the government can accept a voluntary turnover of films from a common carrier, we think it was wrongly decided because it misconceives the nature of the third party search doctrine. Indeed, the continued vitality of *Kelly* is questionable even in the Eighth Circuit. See *United States v. Roberts*, No. 79-1396 (8th Cir. Nov. 13, 1979), slip op. 9. In any case, we submit that legitimate privacy interests are greater where materials are shipped under the true names of the sender and recipient, as in *Kelly*, than where, as here, they are shipped under fictitious names.

c. The court in *Kelly* also based its ruling on the ground that the books and magazines involved in that case were "presumptively protected by the First Amendment," and that the warrantless "seizure" of those items was therefore unreasonable under the Fourth Amendment (529 F.2d at 1372-1373). Petitioners take essentially the same position (Walter Br. 28; Sanders Br. 13-14). We turn to examine this contention.

The setting in which a "seizure" has taken place is an important factor in determining whether that seizure complied with the requirements of the Fourth

Amendment. *Roaden v. Kentucky*, 413 U.S. 496, 501, 503-504 (1973). Thus, before the government may seize "arguably protected" material that is in the process of being distributed or exhibited to the public, it must first obtain a constitutionally sufficient warrant from a magistrate who has had an opportunity to focus searchingly on the question of obscenity. See *Roaden v. Kentucky*, *supra*; *Heller v. New York*, 413 U.S. 483 (1973); *Marcus v. Search Warrant*, 367 U.S. 717, 731-732 (1961). When books or films are forcibly seized in such a setting, First Amendment values are implicated, because the seizure brings "to an abrupt halt an orderly and presumptively legitimate distribution or exhibition." *Roaden v. Kentucky*, *supra*, 413 U.S. at 504.

But that is not even remotely the case here. The government did not "seize" the material; instead, it acquired the material pursuant to a legitimate consensual transfer by L'Eggs (see pages 28-34, *supra*). Neither *Roaden* nor any other decision of this Court suggests that the government must obtain a judicial determination of probable obscenity before accepting material that is voluntarily tendered to it. Moreover, unlike the situation in *Roaden* and the cases cited therein, there was no taking from a bookstore or commercial theater,²³ nor were the

²³ "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes * * * [the] Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentucky*, *supra*, 413 U.S. at 504 (footnote omitted). This case is therefore clearly distinguishable from *Lo-Ji Sales, Inc. v. New*

films on the "threshold of dissemination" (*Heller v. New York*, *supra*, 413 U.S. at 492 n.8; *Mishkin v. New York*, 383 U.S. 502, 513 (1966)) when the FBI accepted the shipment from L'Eggs. On the contrary, the films were not in the process of distribution at all. They had already been distributed to various adult bookstores in Florida, but had not been sold and, accordingly, petitioners decided to return the films to a warehouse for storage, with no apparent plans for further circulation. Thus, the public had been given an opportunity to purchase the films and had rejected that opportunity.

Furthermore, by the time the FBI took possession of the films, they had left the distribution chain completely and had come to rest at the L'Eggs hosiery company, whose employees were understandably anxious to rid themselves of the films and thereby protect the company's name. The FBI accepted L'Eggs' offer of the films with the twofold purpose of assisting L'Eggs and investigating a possible crime. In sum, viewing the "setting in which they were taken" (*Roaden*, *supra*, 413 U.S. at 503), no serious claim can be made that the transfer of the films from L'Eggs to the FBI had even an attenuated connection with First Amendment interests. It would demean First Amendment principles to apply a rule of exclusion to obscene material misdirected to a private

York, *supra*, in which the police conducted a wholesale search and seizure on the premises of a bookstore in the absence of a valid consent.

party where the true interest of the sender was to remove the material from circulation.²⁴

3. *The Government's Screening of the Films Did Not Violate Petitioners' Fourth Amendment Rights*

Approximately one month after acquiring the films from L'Eggs, FBI agents screened the films. Petitioners both contend (Walter Br. 29-34; Sanders Br. 17) that this viewing of the films by the FBI constituted a new "search" distinguishable from the earlier private search conducted by the employees of L'Eggs. They argue that this different search could only be made pursuant to a warrant. But merely characterizing the screenings as a distinct "search" does not advance petitioners' argument. Without a legitimate expectation of privacy, no Fourth Amend-

²⁴ None of the First Amendment concerns raised by petitioner Walter (Br. 28) is applicable here. This is not a situation in which there has been "government sanctioned private censorship without judicial supervision"; rather, L'Eggs' personnel took possession of the packages and transferred them to the government because they were concerned that the company might be implicated in criminal activity. Nor is there any danger that dissemination of legitimate expression by common carrier might be deterred; while shippers such as petitioners might no longer use fictitious names when sending "arguably protected" material by common carrier, so far as we are aware there is no First Amendment right to ship goods under false names. In addition, as we have demonstrated, on the facts of this case there was no problem of prior restraint in the transfer of the films from L'Eggs to the government. The transfer was not for the purpose of destruction or censorship, and the public had already rejected the opportunity to purchase the films.

ment violation can occur. We submit that once the boxes had been opened and the individual film containers inspected by L'Eggs' personnel, petitioners lost any reasonable expectation of privacy they may have had concerning the contents of the films, and may not invoke the Fourth Amendment exclusionary rule to obtain their suppression.²⁵

Petitioners can draw no support from *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, No. 77-1497 (June 20, 1979). Those cases hold that, absent exigent circumstances, closed items of luggage lawfully seized by the police may not be opened and searched without a warrant. The basis for the Court's holdings was the recognition that luggage is a common "repository for personal effects" and therefore is inevitably associated with the expectation of privacy. *United States v. Chadwick*, *supra*, 433 U.S. at 11-13; *Arkansas v. Sanders*, *supra*, slip op. 9, 11. Unlike personal luggage, film cartons are not intended as a "repository of personal effects." Moreover, unlike the closed pieces of luggage involved in *Chadwick* and *Sanders*, there was no secret as to what the film cartons contained. The outside of each carton graphically advertised its contents: one side presented a picture of two nude men

²⁵ The government's acquisition of the films pursuant to a consensual transfer was lawful. Thus, even if the screening of the films following that transfer did intrude upon petitioners' legitimate expectations of privacy, the use of the films as evidence at trial was not the "fruit" of that impropriety and suppression would not be an appropriate remedy. Cf. *United States v. Crews*, No. 78-777, argued Oct. 31, 1979.

kissing; the other side bluntly described the sexual conduct portrayed on each film (Pet. App. 10-11 n.5). As the Court noted in *Arkansas v. Sanders*, *supra*, slip op. 11 n.13:

Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.

Had the exteriors of the luggage in *Chadwick* and *Sanders* borne signs that said: "This luggage contains marijuana," we assume that the Court would have upheld the searches because in those circumstances the defendants would no longer have had any justifiable expectations of privacy in the contents of their luggage. Since the exterior of the individual film cartons in this case proclaimed the nature of their contents, petitioners likewise had no remaining Fourth Amendment privacy interest in the reels of film. A film is not a container in which something is secreted away; it is instead a series of miniature photographs intended to be magnified by a projector and viewed in rapid sequence. There could be little doubt as to what each frame depicted since each carton described the portrayed sexual activity in a manner intended to entice the reader to view the film.²⁶ Ac-

²⁶ Even if the containers had not described the actions portrayed in the films, the screening was not a "search." As

cordingly, since the viewing of the films with the aid of a projector did not invade any protected "zone of privacy," FBI Agent Mandyck did not need a warrant to screen the films.²⁷

Judge Webster stated in *United States v. Haes*, 551 F.2d 767, 772-773 (8th Cir. 1977) (dissenting opinion; footnote omitted):

The Fourth Amendment prohibits *unreasonable* searches and seizures. To characterize the inspection of the film by the FBI agents as an independent search requiring application of the exclusionary rule goes too far, in my opinion * * *.

Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? * * * Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.

The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed.

²⁷ Petitioner Walter relies (Br. 31) on *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977) to support the proposition that the descriptions on the film containers did not provide probable cause to believe that the films were obscene and would not have supported the issuance of a warrant. In *Tupler* the Ninth Circuit held that unless either the policeman or the magistrate views the allegedly obscene films himself prior to the issuance of a warrant for their seizure, the warrant is invalid as having been issued on less than probable cause. The government had argued that the descriptions on the film cartons were sufficient to support a finding of probable cause. Whether or not *Tupler* was correctly decided, it has no

C. The Retention Of The Films By The Government Without A Judicial Determination Of Obscenity Does Not Require Suppression

At the time the government received the films from L'Eggs, it was unaware of the true identities of either the shipper or the intended recipient of the packages. Several weeks after the transfer, co-defendant Michael Grassi, petitioners' employee, was informed by a L'Eggs representative that the films were in the possession of the FBI.²⁸ Grassi, in turn, notified petitioners, who attempted to dispose of any evidence connecting them to the films. Petitioners never contacted the FBI regarding the films, and did not request the return of their property until they filed a motion to suppress almost 20 months after having received actual notice that the films were in the government's custody. Petitioners contend (Walter Br. 34-38; Sanders Br. 11-13, 15-17) that the government's failure to notify them directly that it had the films, and its failure to seek a judicial determination of obscenity during the preindictment stage, amounted to a prior restraint of expression under the First Amendment and required suppression of the films from evidence at petitioners' trial.

relevance here. Unlike *Tupler*, this case involves not a "seizure" of films from a bookstore, but a viewing of films that had been consensually transferred to the government by an unintended recipient. Further, we do not argue that the carton covers gave the FBI agents probable cause to view the films; rather, our contention is that the descriptions of the films on the carton covers eliminated any legitimate expectation of privacy petitioners may have had in the films.

²⁸ The FBI was subsequently notified that Grassi had inquired about the films.

1. The Government's Failure To Give Petitioners Direct Notification That It Had The Films Does Not Warrant Exclusion Since Petitioners Had Actual Notice Of That Fact

We recognize that elementary considerations of fairness ordinarily would require that government agents notify the owner, if his identity is known, of their seizure and possession of expressive material, so that the owner may seek return of the material. Rule 41(d), Fed. R. Crim. P., requires that the officer "shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken." Accordingly, if the government had "seized" the films from L'Eggs, it would have been required to serve the company with the warrant and a receipt. While Rule 41 does not provide for any type of notice that would have reached petitioners, nevertheless, it would seem to follow that all parties whom the government has reason to believe would be affected by a taking should be notified. Thus, where the government "seizes" a telephone conversation by wiretap, it must thereafter inform the court of all classes of intercepted parties so that the court in turn can notify those intercepted parties who are under investigation that their conversations were seized. 18 U.S.C. 2518(8)(d); *United States v. Donovan*, 429 U.S. 413 (1977). In those circumstances notice would be constitutionally compelled.

See *Berger v. New York*, 388 U.S. 41, 60 (1967). Cf. *Katz v. United States*, *supra*, 389 U.S. at 368.

In other contexts, this Court has concluded that principles of due process require that a person be given notice of a pending proceeding as a consequence of which he may lose some property. See, e.g., *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). As the Court stated in *Mullane*, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314. In short, we recognize that as a practical matter, the government cannot expect a party to seek the return of his property unless the party knows where it is.²⁹

However, because the record in this case reflects that petitioners had actual notice that the government had possession of the films, the government's failure to provide direct notice to petitioners resulted in no constitutional violation—much less one requiring the exclusion of trustworthy evidence. Whenever

²⁹ We note, however, that this notice need not invariably be a formalized procedure. If the government, upon receipt of books, papers or films, does not seek permanently to deprive the owner of his property, we submit that the owner is entitled to notice of a most informal nature. For example, oral notice in the manner of a telephone call or personal conversation should dispense with the government's obligation. See *Goss v. Lopez*, 419 U.S. 565, 579-581 (1975) (oral notice sufficient to afford a student an opportunity to object to his suspension from school).

notice is constitutionally required the object is to ensure that the owner of materials arguably protected by the First Amendment will be able to exercise his right to seek their return and thereby curtail any infringement of his First Amendment interests. Manifestly, where the owner knows that the government has his property, he possesses all the knowledge that is necessary to seek its return. Here petitioners had actual knowledge that the FBI held their films. They were entitled to no more.

2. *The Government's Failure To Seek An Evidentiary Hearing On The Issue Of Obscenity Did Not Violate Petitioners' First Amendment Rights*

This Court has held that "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). See *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971); *Heller v. New York*, *supra*, 413 U.S. at 489. Thus, where expressive material has been seized with a view toward its absolute suppression through censorship or destruction, a prompt judicial determination of the obscenity issue in an adversary proceeding must be made at the request of any interested party. *Id.* at 492. See also *Lo-Ji Sales, Inc. v. New York*, *supra*, slip op. 8.

We note that the government accepted L'EGGS' offer of the films both in a caretaking capacity and with a view to initiating an investigation into a possible violation of the federal obscenity laws. That these were the factors which motivated the government is incontestable on the record. Recognition of this fact considerably narrows the compass of the First Amendment inquiry related to the FBI's retention of the films. To begin with, the films were not being retained by the government for the sole purpose of their destruction (compare *Marcus v. Search Warrant*, *supra*; *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964)), or as part of a scheme to ban the exhibition or distribution of the films for purposes of censorship. See *Freedman v. Maryland*, *supra*; see also *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Nor does this case come to the Court as part of a system of prior restraint "bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Freedman v. Maryland*, *supra*.³⁰ Finally, there is not a scintilla of

³⁰ The question of the constitutional limits of state power in this regard is again before the Court in *Vance v. Universal Amusement Co.*, No. 78-1588, argued, Nov. 28, 1979.

evidence in the record that the government's retention of the films was meant to or had a "chilling effect" on the free exercise of petitioners' First Amendment rights (compare *Bantam Books, Inc. v. Sullivan*, *supra*),³¹ or that it "[became] a form of censorship." *Heller v. New York*, *supra*, 413 U.S. at 490.

In the present case, petitioners were not threatened that they would be prosecuted for selling other copies of the "David's Boys" films. The only plausible fear that petitioners might have harbored was that the government would prosecute them for the shipment in question. Furthermore, the retention of the films by the government pending indictment did not limit the public's access to the films in question, or restrict petitioners' freedom of expression. Indeed, the public had declined the opportunity to purchase the films and the films were therefore being returned for storage.

Moreover, petitioners do not contend that an adversary proceeding would not have been provided to them upon request. Instead, they argue that it was the government's obligation to arrange for an adversary proceeding on its own initiative, even though petitioners, who had actual notice that the films were

³¹ In *Bantam Books*, the Rhode Island Commission reviewed books and made recommendations that criminal prosecutions be commenced against the distributors of those books which it deemed objectionable. The effect of the commission's action was that booksellers were "coerc[ed], persuad[ed] and intimidat[ed]" into not selling the named books by the "threat of invoking legal sanctions." 372 U.S. at 67.

in the government's possession, did not request any such proceeding. Petitioners made no motion for return of property until almost 20 months after they received notice concerning the whereabouts of the films. In these circumstances, "it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner[s] had desired." *Heller v. New York, supra*, 413 U.S. at 490. Petitioners' failure to seek adversary resolution of the issue defeats their claim, since "those delays caused by the choice of the defendant" are "definitely excluded from any consideration of 'promptness.'" *Ibid.* In these circumstances, petitioners cannot claim an infringement of their First Amendment rights.³²

Finally, as the court of appeals correctly observed (Pet. App. 38-39), even if their First Amendment rights were violated, petitioners were entitled to no more than the return of the films, not their suppression at trial. See *Heller v. New York, supra*, 413 U.S. at 493 n.11. See also, e.g., *United States v. Bush*, 582 F.2d 1016, 1020-1022 (5th Cir. 1978); *United States v. Womack*, 509 F.2d 368, 382 n.48 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975). Because

³² Petitioner Walter asserts (Br. 36-37 n.9) that he had no duty to request the return of the property because it was not seized pursuant to a warrant. But Rule 41(e), Fed. R. Crim. P., authorizing a motion for return of property by a person aggrieved by an unlawful search or seizure, makes no distinction between seizures made with or without warrants.

petitioners' failure to obtain a prompt judicial determination of obscenity was their own doing, exclusion of the evidence would serve no deterrent purpose.

II. THERE IS NO MERIT TO THE TRIAL-RELATED ISSUES RAISED BY PETITIONERS

A. The Trial Court Correctly Charged The Jury On The Issue Of Community Standards

This Court first held that the obscenity *vel non* of particular materials should be judged by their "impact upon the average person in the community" in *Roth v. United States*, 354 U.S. 476, 490 (1957).³³ Whatever the geographic limits of the relevant community,³⁴ "the Court has never varied from the *Roth*

³³ The average person standard altered the existing test of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868), that obscenity be judged by the views of the most susceptible and sensitive members of society. *Roth v. United States, supra*, 354 U.S. at 488-489. It also permitted the materials in question to be judged objectively rather than by the "subjective personal and private views" of each individual juror. *Pinkus v. United States*, 436 U.S. 293, 300 (1978).

³⁴ Although *Roth v. United States, supra*, did not define the geographic boundaries of the "community", the Court applied a national standard in the cases subsequent to *Roth*. See *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962). The national standard was abandoned and a local community standard was adopted in *Miller v. California*, 413 U.S. 15, 30-34 (1973). One Term later, in *Hamling v. United States*, 418 U.S. 87, 107 (1974), the Court held that an instruction employing a national standard "does not render [the] convictions void as a matter of constitutional law * * *" because such an instruction accomplished the purpose of assuring " * * * that the material is judged neither on the basis of each juror's

position that the community as a whole should be the judge of obscenity, and not a small, atypical segment of the community." *Smith v. United States*, 431 U.S. 291, 300 n.6, 305 (1977). Accord, *Miller v. California*, 413 U.S. 15, 30 (1973); *Hamling v. United States*, 418 U.S. 87, 102-105 (1974); *Pinkus v. United States*, 436 U.S. 293, 299-302 (1978); *United States v. 12 200-ft. Reels of Film*, *supra*, 413 U.S. at 129-130. In certain instances, the prurient appeal of materials may be assessed alternatively by reference to members of a deviant sexual group. See, e.g., *Pinkus v. United States*, *supra*, 436 U.S. at 301-303; *Hamling v. United States*, *supra*, 418 U.S. at 127-129; *Mishkin v. New York*, *supra*, 383 U.S. at 505. But juries may not be instructed to consider the prurient appeal of the materials to children, where children are not involved in the case. *Pinkus v. United States*, *supra*, 436 U.S. at 297-298. As we now demonstrate, the instructions in this case did not depart from these settled principles.

1. *The "Average Person" Charge Did Not Violate The Rule of Pinkus v. United States*

The district court instructed the jury (A. 64, 66):

"Obscene" means something which deals with sex in such a manner that the predominant appeal of the material, viewed in its entirety, is to the prurient interest of the average person of the

personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." In the present case petitioners were tried under a local community standard, the community being the Middle District of Florida.

community as a whole, or the prurient interest of a deviant sexual group, as the case might be * * *

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average, and normal attitude toward, and interest in sex.

At no time did the court instruct the jury that children were part of the community. Petitioners contend (Walter Br. 43-45; Sanders Br. 18-19), however, that this Court's holding in *Pinkus v. United States*, *supra*, 436 U.S. at 297-298, requires that the jury be instructed to assess the interests of the average "adult" rather than the average "person." We submit that the court of appeals was correct in holding that "[the district court's] instruction adequately directed jury consideration to the contemporary standards of adults and thereby avoided the danger emphasized in *Pinkus* * * *" (Pet. App. 15-17).

In *Pinkus*, unlike the present case, the trial judge instructed the jury that, in ascertaining community standards, "you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious, men women and children, from all walks of life." 436 U.S. at 296 (emphasis added). See also *United States v. Bush*, *supra*, 582 F.2d at 1021-1022 (jury instructed to include the "young" in the community). Even then, the Court acknowledged that "cogent ar-

guments can be made that the inclusion of children was harmless error" (*Pinkus, supra*, 436 U.S. at 297). Here, we submit, there is nothing approaching reversible error. While, as a general rule, it would be better practice specifically to instruct the jury that the average person is derived from a community of adults, mere failure to do so cannot compel reversal. In the present case, it should be noted, petitioners do not contest the obscenity of the films (Walter Br. 40-41; Sanders Br. 5). Moreover, as the court of appeals observed (Pet. App. 17), the district court adequately directed the jury to apply an adult standard when it instructed them to apply the standards of "the average person with an average and normal attitude toward, and interest in, sex" (A. 66).³⁵ There simply is no basis for concluding that the films here were judged by anything less than an adult standard.

2. The District Court Properly Refused to Permit The Jury to Decide Whether The Term "Average Person" Is Impossible Of Calculation

Petitioner Walter contends (Br. 52-54) that the district court failed to instruct the jury on his theory of the case, namely, that certain terms in the definition of obscenity are impossible to calculate. For

³⁵ Contrary to petitioner Walter's contention (Br. 44), reversal is not required simply because one prospective juror referred to his teenage children during voir dire (V Tr. 85). That prospective juror was not selected to hear the case. Nor was there reason to instruct the jury that children were not involved in this case since that fact was obvious from the evidence.

example, according to petitioner, because "average" is defined as the mean, the "average person" must embody the physical attributes of both men and women and must therefore be transsexual. But this is not a "theory of the case."³⁶ Rather, this is a vagueness challenge to the obscenity definition which presents a question of law within the province of the court, not the jury. *Berra v. United States*, 351 U.S. 131, 134 (1956); *Dennis v. United States*, 341 U.S. 494, 513 (1951). Cf. *Lego v. Twomey*, 404 U.S. 477, 490 (1972); *Brady v. Maryland*, 373 U.S. 83, 89-90 (1963). And it is one that has been repeatedly resolved against the position petitioner advocates. See, e.g. *Roth v. United States, supra*, 354 U.S. at 487-492; *Hamling v. United States, supra*, 418 U.S. at 110-117; *Miller v. California, supra*, 413 U.S. at 23-30.

Furthermore, Walter's argument misconceives the jury's function in applying the average person test. The jury is not required to compute "some abstract formulation" (*Miller v. California, supra*, 413 U.S. at 30) or resolve a statistical equation to determine a mathematical average. Instead, obscenity is to be judged by the standards of a person who is average in his attitudes toward sex, "rather than the most prudish or the most tolerant." *Pinkus v. United States, supra*, 436 U.S. at 299; *Smith v. United States, supra*, 431 U.S. at 304. The average person test has been likened to the reasonable man test in

³⁶ We note in passing that a transsexual is a person who has undergone a change of sexual organs, not one who possesses both male and female sexual characteristics.

tort law. *Pinkus v. United States*, *supra*, 436 U.S. at 301. Both are means for employing an objective rather than a subjective standard; the jury is to "determine the collective view of the community." *Id.* at 300-301. It is apparent, therefore, that petitioner was not entitled to an instruction on his alleged "theory of the case."

3. *The District Court Properly Instructed The Jury To Consider The Prurient Appeal Of The Films Either To The Average Person In The Community Or To Members Of A Deviant Sexual Group*

Where all or part of the alleged obscene material caters not to the interests of the average person in society, but, rather, to members of a specific deviant group, the first prong of the three-part test for obscenity³⁷ may be adjusted to measure the prurient appeal of the materials to that group. *Pinkus v. United States*, *supra*, 436 U.S. at 301-303; *Hamling v. United States*, *supra*, 418 U.S. at 127-129; *Mishkin v. New York*, *supra*. As the Court stated in *Mishkin* (383 U.S. at 508-509):

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the

³⁷ In *Miller v. California*, *supra*, 413 U.S. at 24, the Court reformulated the test for obscenity *vel non* as follows: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

prurient-appeal requirement of the *Roth* [now *Miller*] test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

* * * * *

We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group * * *.

Since the films were homosexual in orientation, the district court gave the following deviant appeal instruction (A. 65-67):

The first test to be applied, therefore, in determining whether given material is obscene, is whether the predominant theme or purpose of the material, * * * when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.

* * * * *

In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.

Petitioner Walter first contends (Br. 46) that "the instruction given precluded any consideration whether

the films had a prurient appeal to members of the homosexual community." But this claim is answered by the charge itself. On three separate occasions the district court instructed the jury that it could consider the prurient appeal of the films to members of a deviant sexual group (in addition to the two above-quoted portions of the charge, see A. 64). Petitioner Walter argues, however, that the district court shifted the burden of proof to the defendants when it charged that deviant appeal to homosexuals could only be considered "if you find, *beyond a reasonable doubt*, that the material was intended to appeal to the prurient interest of such a group" (A. 67; emphasis added). Petitioner's interpretation of the charge is patently incorrect. The burden was on the government to show that the films were intended for homosexuals before it was entitled to a deviant appeal instruction.³⁸ See *Pinkus, supra*. There was no shifting of burdens here.³⁹ In any event, we cannot appreciate how petitioner was prejudiced if the jury was foreclosed from considering prurient appeal to homosexuals. If, indeed, the jurors were limited to considering the "average person," they presumably found

³⁸ Of course the films themselves were sufficient evidence to warrant the deviant appeal charge. *Pinkus v. United States, supra*, 436 U.S. at 301-303; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973).

³⁹ Petitioner does not deny that the district court instructed the jury that the government was required to prove guilt beyond a reasonable doubt. (See XI Tr. 199, 200, 204, 207, 212, 219, 224, 225).

it *more* difficult to conclude that the films appealed to prurient interest.

B. The Evidence Of Petitioner Walter's Scierter Was Sufficient To Support His Conviction

The purpose of requiring proof of scierter in an obscenity prosecution is to prevent booksellers and others from being convicted for merely possessing an obscene book, "even though they had not the slightest notice of the character of the books they sold." *Smith v. California*, 361 U.S. 147, 152 (1959). In *Mishkin v. New York, supra*, 383 U.S. at 510-511, and *Ginsberg v. New York*, 390 U.S. 629, 644 (1968) (emphasis omitted), the Court upheld the constitutionality of a scierter definition which indicated "that only those who are in some manner aware of the character of the material they attempt to distribute should be punished."⁴⁰ At the same time, however,

⁴⁰ On the element of scierter, the trial court in this case charged (A. 63-64):

One of the essential elements the Government must prove is the element of scierter or knowledge; that is, that the defendant knew the general nature of the contents of the articles which were transported in interstate commerce. The Government does not have the obligation of showing that the defendant knew that such articles were in fact legally obscene.

Therefore, if you find beyond a reasonable doubt that the defendant transported in interstate commerce the articles in question, and that he knew the general nature of the articles, that is, he knew what they actually were, and if you find beyond a reasonable doubt that the articles were in fact "obscene" within the meaning of these instructions, then you may find that the defendant had the requisite knowledge, or scierter as we call it in the law.

"[e]yewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents." *Smith v. California*, *supra*, 361 U.S. at 154. Nor is the government constitutionally required to prove that a defendant knew that any of the films in question was legally obscene. *Hamling v. United States*, *supra*, 418 U.S. at 123. It is enough that the defendant is shown to know "the character and nature of the materials." *Ibid.* Here, as the court of appeals held (Pet. App. 13-15), there was sufficient evidence showing that petitioner Walter knew of, participated in, and consented to the acts charged in the indictment.

The evidence showed that Walter and Sanders jointly owned and operated an extensive network of 20 to 30 adult cinemas, bookstores, and distribution warehouses, including co-petitioners Gulf Coast News Agency and TWA (VI Tr. 50-61). More specifically, Walter hired the accountants for TWA and Gulf Coast News and provided them with instructions and information necessary to do the book-keeping, payroll and tax work for the firms (VI Tr. 43, 55, 63, 67, 88-102). Walter also authorized the accountants to write checks on the companies' accounts (VI Tr. 60). One of the accountants, William Boshell, overheard Walter and Sanders admit that they were personally responsible for each store in the network (VI Tr. 112-113). Other employees at TWA, Gulf Coast News, or the individual adult bookstores also took orders from both Walter and Sanders, whom they described as the bosses, partners

and owners of the business (VI Tr. 171-172, 177, 180; VII Tr. 35, 184, 203, 210-211; VIII Tr. 52-53; IX Tr. 23-33, 39). Walter was frequently seen at the TWA and Gulf Coast News warehouses before and after the date of the shipment (September 25, 1975), and he maintained offices in both locations (VI Tr. 74-75, 116, 174; VII Tr. 17, 35, 38-39, 109; VIII Tr. 60-61; IX Tr. 40, 117-120).

From this day-to-day involvement in the business, it was reasonable to infer that Walter knew what character of materials were involved. But there was additional evidence of his guilty knowledge. Thus, despite the unquestioned authority of Walter and Sanders over the enterprise, they attempted to conceal their ownership interest in the business. Walter would not admit to his accountants that he owned any stock in the corporations (VI Tr. 65). Walter and Sanders told Boshell that no one owned the various companies and, indeed, the stock certificates were issued in blank (VI Tr. 103). When Boshell told petitioners that the owners of the stock would then be the holder of the certificates, Walter and Sanders referred him to their attorney, who in turn informed Boshell that TWA was owned by Michael Grassi and Gulf Coast News was owned by Wayne Schergen (VI Tr. 104-107; Pet. App. E). Carole Maxey, Sanders' girlfriend, was listed as the owner of the "Fun & Games" bookstore although she was unaware of that status and never participated in the store's profits (IX Tr. 18-20, 37-38). Similarly, when Ron Akins, a bookstore manager for Walter and Sanders, was desig-

nated president of four companies, including TWA, Akins received a raise of only ten dollars a week (from \$125 to \$135) and no share of the profits (VII Tr. 185-193).

There was also ample evidence as to the character and nature of the merchandise warehoused and distributed by Walter and Sanders at TWA and Gulf Coast News. The goods were limited to items normally sold in "adult" bookstores—books, magazines, newspapers and films that explicitly portrayed sexual conduct, including material described as "hardcore" pornography, in addition to "rubber goods" and "novelty items" (VI Tr. 51, 56, 173-176, 184, 196; VII Tr. 9, 37; VIII Tr. 62-65, 76). On several occasions, managers of these bookstores were arrested for selling obscene goods (VI Tr. 199; VII Tr. 9; VIII Tr. 70).

In short, there was more than sufficient evidence that Walter possessed the requisite knowledge. Whether or not he viewed the particular films involved in this case is immaterial; he could not help but be aware of the pornographic character of the wares he purveyed. This is not a case in which a legitimate bookseller inadvertently stocks an obscene book. See *Smith v. California, supra*. What is involved here is the shipment of 871 pornographic films worth thousands of dollars, a shipment too large to pass unnoticed. Walter has chosen to profit from the sale of explicit sexual material. He therefore has elected to take the risk that the interstate shipment of some of his merchandise may violate the

federal obscenity laws. *Hamling v. United States, supra*, 418 U.S. at 124.

C. Petitioner Walter Was Not Denied A Fair Trial
By The Alleged Inattentiveness Of A Juror

After the jury had viewed three of the five films, counsel for petitioner Walter complained that two jurors were not paying attention. The trial court responded (A. 46-47):

I made it a point to observe the jury from time to time during the publication of each of these exhibits. It seems to me that the jury is paying strict attention with the possible exception of Mr. Kohring and Mrs. Silver, who is not one of the jurors named by [petitioner's attorney].

* * * * *

On the other hand, it seems to me that, at least, I would say seven out of the ten times that I have observed or may have observed the jury, that those jurors were viewing the films, and they were noticed by me to have averted their eyes on two occasions.

But I don't think the situation is one of such inattentiveness as requires intervention by me at this time.

The court thereafter instructed juror Kohring not to read during the exhibition of the films. The final two films were then shown. Thereafter, petitioner Walter requested that juror Kohring be excused. The court responded (A. 48):

Well, I observed the jury * * * and made it a point to do so from time to time on numerous

occasions during the publication of the exhibits. And I would simply restate what I had to say at Sidebar at this particular time.

I do not believe that any individual juror was so inattentive during publication as to require excusal.

Petitioner Walter here contends that these rulings were error (Br. 48-49). But questions as to juror inattentiveness are particularly suited to determination by the trial court, who is in the position to observe the conduct and demeanor of the jury. Petitioner has offered no compelling reasons for doubting the accuracy of the judge's observations. The court of appeals accepted the findings of the trial court and there is no reason here for deviating from the well settled practice of this Court not to disturb a finding of fact concurred in by both lower courts. *Berenyi v. Immigration Director*, 385 U.S. 630, 636 (1967).⁴¹

D. The District Court Did Not Abuse Its Discretion Concerning The Questions Asked Prospective Jurors On Voir Dire

Petitioner Walter next complains (Br. 49-51) that the district court failed to ask prospective jurors several questions that he had requested. It is well settled that "[t]he propriety of a particular question is a decision for the trial court to make in the first

⁴¹ Moreover, due to the repetitive nature of the five films, we submit that it was not necessary for each juror to watch every frame. An occasional aversion of the eyes was most likely the result of the offensive conduct portrayed on the films.

instance." *Smith v. United States*, *supra*, 431 U.S. at 308. Here, petitioner requested that the district court ask each prospective juror 122 separate questions, some of which had subparts. Quite rightly, the court was unwilling to ask them all, since to do so would have consumed more time than the trial itself. Instead, the court asked a more limited, but generous, number of pertinent questions (See V Tr. *passim*). The court's conduct of the voir dire demonstrated a prudent exercise of its discretion.

Petitioner specifically alleges that the district court refused to ask the prospective jurors how long they had resided in the community, a question which this Court described as possibly "helpful" in *Smith v. United States*, *supra*. Although the district court did not specifically address this question to each prospective juror, the court did question most jurors about either their period of residence in the community or the length of time spent at their present place of employment. See *e.g.*, V Tr. 100-101, 103-106, 108, 111, 179, 181, 182, 184, 221-223. Moreover, each juror called for jury duty had to reside in the community at least one year, a time sufficient to provide familiarity with local standards (II Tr. Doc. 61 and 62). In addition to numerous routine questions regarding such matters as employment and age, the court inquired about the jurors' opinions on the obscenity laws (V Tr. 85-86), whether any of the jurors were members of a committee or organization against pornography (V Tr. 87-88), whether any of

the jurors would be so shocked and offended by the homosexual nature of the films as not to be able to sit in judgment of them (V Tr. 90), whether the jurors were willing to acquit petitioners if the films were not obscene under the law (V Tr. 91), whether any of the jurors regularly subscribed to or purchased books, films or magazines that dealt explicitly with sex (V Tr. 91), and whether any of the jurors served at any time as an officer or deacon of a church (V Tr. 132-136). We submit that petitioner was entitled to no more.

E. Petitioner Walter Was Not Entitled To A Severance

It is settled law that the decision whether or not to grant a severance rests within the sound discretion of the district court. *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978); *United States v. Adams*, 581 F.2d 193, 197 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); *United States v. Jones*, 578 F.2d 1332, 1339 (10th Cir.), cert. denied, 439 U.S. 913 (1978). Generally, the court acts within its lawful discretion in denying a motion to sever where a single set of facts and evidence will prove the charges against both defendants, since by avoiding multiple trials, judicial efficiency and economy are promoted. See *Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968). These principles were served in this case.

Here, the evidence proving the shipment of the five films and their obscenity was essentially the same against both Walter and Sanders. Also, the same witnesses were used to show the partnership role of

both men in TWA and Gulf Coast News and thus their scienter. Further, the indictment charged a conspiracy, the presence of which renders joinder appropriate under Rule 8, Fed.R.Crim.P., absent bad faith on the part of the government in charging conspiracy. See *Schaffer v. United States*, 362 U.S. 511 (1960); *Peterson v. United States*, 405 F.2d 102, 105-106 (8th Cir. 1968), cert. denied, 395 U.S. 938 (1969); *United States v. Catino*, 403 F.2d 491, 495 (2d Cir. 1968), cert. denied, 394 U.S. 1003 (1969); *Fernandez v. United States*, 329 F.2d 899, 905-906 (9th Cir.), cert. denied, 379 U.S. 832 (1964). See also Rule 14, Fed. R. Crim. P. There was clearly no bad faith here.

Petitioner Walter's claim that Sanders was the subject of much adverse publicity is unsubstantiated and unexplained. In any event, the district court questioned prospective jurors extensively on voir dire about pretrial publicity (see, e.g. V Tr. 36-47), and about their ability to give separate treatment to the individual defendants (V Tr. 132).

Nor was joinder improper because of the testimony of Carol Maxey, Sanders' former girlfriend. Whether or not Maxey, on cross-examination by defense counsel, intimated that her false grand jury testimony was instigated by threats from Sanders, this did not prejudice Walter and is no ground for a severance. Further, she did not testify to hearsay statements by Sanders concerning Walter; rather she testified to conversations *between* Walter and Sanders concerning the operation of their adult bookstore business (IX Tr. 23, 26-33, 39). That testimony was

admissible in evidence against both. See Fed. R. Evid. 801(d)(2)(A) and (E). The denial of a severance thus did not violate the rule of *Bruton v. United States*, *supra*.

Walter's final two grounds for severance both involve the failure of co-defendant Michael Grassi to testify. Prior to the trial of petitioners, Grassi pleaded guilty to one count of the indictment under an agreement in which he promised to appear as a witness for the government. At trial, on the advice of his present attorney, Grassi refused to testify on behalf of the government for the reason that he intended to invoke the attorney-client privilege regarding admissions he had made to his former attorney, Glen Zell, who represented petitioner Sanders at trial (VIII Tr. 10-12). After the government rested, counsel for petitioner Walter seized upon Grassi's silence and claimed that he desired to call Grassi as a witness for the purpose of showing that Walter had not viewed the "David's Boys" films. Walter's attorney maintained that he could call Grassi to testify only if granted a severance so that Grassi would not be subjected to cross-examination by attorney Zell (IX Tr. 112-121).

The court's denial of this tardy severance motion (IX Tr. 121-122) was in all respects proper. See *United States v. Caldwell*, 543 F.2d 1333, 1359 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976). Walter made no credible showing that Grassi would testify in his behalf at a separate trial (see IX Tr. 115). Indeed, Grassi's guilty plea was thereafter

withdrawn and he was tried on all counts of the indictment. Therefore, it is likely that he would have invoked the Fifth Amendment privilege against self-incrimination as well as the attorney-client privilege if called to testify for Walter at a separate trial. Finally, Grassi's testimony would not have been exculpatory. As we have shown (see pages 57-61, *supra*), Walter's conviction rests on sufficient evidence whether or not he viewed the films. Further, considering the incriminating nature of Grassi's suppression hearing testimony, it is unlikely that Grassi could have helped Walter had he testified at trial. Accordingly, the district court's denial of the severance motion did not amount to an abuse of judicial discretion. See *United States v. Becker*, 585 F.2d 703, 706 (4th Cir. 1978); *United States v. Gay*, 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978); *United States v. Rice*, 550 F.2d 1364 (5th Cir.), cert. denied, 434 U.S. 954 (1977); *United States v. Larios-Montes*, 500 F.2d 941 (9th Cir. 1974), cert. denied, 422 U.S. 1057 (1975); *United States v. Thomas*, 453 F.2d 141 (9th Cir. 1971), cert. denied, 405 U.S. 1069 (1972).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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